The Ceylon Law Weekly

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with a Section in Sinhala

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Delict—Roman-Dutch Law—Conversion—Whether tort of conversion is part of the law of Ceylon? —English common law on this point not brought in by section 98(2) *of Bills of Exchange Ordinance and section* 3 *of Civil Law Ordinance.*

The plaintiff drew a cheque crossed "Not negotiable" for Rs. 1,117.25 in favour of the payee. It was stolen from the drawer, and the payee's indorsement was forged. Subsequently it was tendered to the defendant in payment for a radio set by a person who was unknown to the defendant. The defendant accepted the cheque, credited it to his account, and when the cheque was realised, handed over the radio set and the balance sum of Rs. 925.25 to this person who could not be traced thereafter.

The plaintiff sued the defendant for the recovery of the sum of Rs. 1,117.25 and in the plaint averred that the indorsement of the payee on the cheque had been forged, that the defendant had no title to the cheque, and consequently had no lawful authority to convert the cheque to his own use.

The defendant stated in his answer that he took the cheque *bona fide* and for value and denied that any cause of action had accrued to the plaintiff to sue him for recovery of the amount represented by the cheque.

Held: (1) That the plaintiff's action was founded on delict and called for the application of the Roman-Dutch Law.

(2) That on the pleadings it was manifest that the action was one for conversion and such an action was not available under the Roman-Dutch Law, although it was available under the Common Law of England.

(3) That section 98(2) of the Bills of Exchange Ordinance was only intended to apply to any omissions or deficiencies in the Ordinance, in the law relating to negotiable instruments, and could not form the basis of the proposition that where the subject matter of a conversion is a cheque, the English common law of conversion was introduced into the law of Ceylon. Section 3 of the Civil Law Ordinance, too, does not have the effect of bringing in the English Law on this point.

(4) That, therefore, the action instituted against the defendant was not maintainable in law.

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Buddhist Temporalities Ordinance

Buddhist Temporalities Ordinance, (*Cap.* 318), *sections* 4, 18, 20 *and* 26—*Seizure of Sanghika property by Fiscal in execution of writ—Claim by senior pupil of Viharadhipathi as Sanghika property—Dismissal of claim—Action filed under section* 247 *Civil Procedure Code—His status to maintain it.*

In execution of a decree entered against a Viharadhipathi of a temple the Fiscal seized a certain property to which the plaintiff preferred a claim on the ground—

(a) that he was the senior pupil of the Viharadhipathi;

(*b*) that the property could not be seized because it was *Sanghika* property.

On his claim being dismissed the plaintiff instituted this action under section 247 of the Civil Procedure Code. This action was dismissed on the ground that the property had not vested in him and, therefore, he had no status to maintain it.

Held: (1) That the plaintiff not being a Viharadhipathi had no status to file this action, because by section 20 of the Buddhist Temporalities Ordinance, all property belonging to a temple vests in the Viharadhipathi.

(2) That the plaintiff's right to make a claim against the Viharadhipathi for his maintenance from the common store of the Vihara is a personal right against the Viharadhipathi and not a right in the land.

(3) That section 26 of the Buddhist Temporalities Ordinance does not prohibit the seizure of a temple land in execution.

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Ceylon (Parliamentary Elections) Order-in-Council

Ceylon (Parliamentary Elections) Order-in-Council of 1946—*Petition for declaring election void—Three charges of corrupt practice and a further paragraph relating to prevalence of such misconduct and/or other circumstances at the election, within the meaning of Article* 77(*a*), *that majority of electors were or may have been prevented from electing the candidate whom they preferred—Whether more than four charges contained in petition.*

Parliamentary Election Rules, 1946, *Rule* 12(2) *and* (3)—*Deposit of security in two instalments within prescribed time—Whether permissible—Adequacy of security—Number of charges—Motion for dismissal of petition for insufficiency of security.*

The petitioner prayed that the election of the respondent be declared void on three grounds of corrupt practices, viz:—

(*a*) false statements made in relation to the personal character of the rival candidate;

(*b*) treating;

(*c*) undue influence.

An additional charge was set out in paragraph 6 of the petition as follows:—

"Your petitioner further states that such misconduct and/or other circumstances prevailed at the said election within the meaning of section 77(*a*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, that the majority of electors were or may have been prevented from electing the candidate whom they preferred."

On the date of filing the petition, viz., 17th April, 1965, a sum of Rs. 5,000/- was deposited as security and on 19th April, 1965, a further sum of Rs. 2000/- was deposited.

The respondent moved under Rule 12(3) for an order directing the dismissal of the petition and for costs on the following grounds:—

(*a*) The security is insufficient as the petition contains more than four charges;

(*b*) The security should have been given by making only one deposit and not two.

It was contended on behalf of the petitioner—

(1) that there were only three charges in the petition as the word "charges" in Rule 12(2) is confined only to corrupt and illegal practices and did not apply to the grounds mentioned in Article 77(*a*), (*b*), (*d*), and (*e*), therefore, Rs. 5,000/- deposited was sufficient security. The second deposit of Rs. 2,000/- was made out of abundance of caution;

(2) that at the worst, there were only four charges. Therefore, Rs. 7,000/- was adequate security;

(3) that even if there were more than four charges, the petition should not be dismissed as Rule 12(3) does not provided for dismissal, but the Court would delete the words "other circumstances" and allow the petitioner to proceed.

Held: (1) That the obligation to dismiss the petition is implicit in Rule 12(3), which gives the respondent the right to apply for its dismissal.

(2) That there is no provision restricting the security to only one deposit, provided it is done within the three days prescribed in Rule 12(1).

(3) That there were four charges set out in the petition and the security deposited was therefore adequate. Paragraph six of the petition which referred to Article 77(*a*) contained one charge.

(4) That the definition of "charges" in *Tillekewardene* v. *Obeyesekera*, (1931) 33 N.L.R. 65, is not exhaustive.

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Election Petition challenging the return of a candidate — Charges under section 77(*a*) *of Ceylon (Parliamentary Elections) Order-in-Council, (Cap.* 381)—*Allegations of undue influence, corrupt practice, misconduct and other circumstances (particulars of which to be furnished with particulars of other charges) preventing majority of electors from electing candidate whom they preferred—Do the words "misconduct and other circumstances" in section* 77(*a*) *constitute one charge or two separate charges—Adequacy of security —Rule* 12(2) *in Third Schedule.*

In a petition challenging the return of a candidate for the Attanagalla Electorate, the petitioners, after alleging charges of undue influence and corrupt practice proceeded to state "that by reason of misconduct" on the part of the respondent, her agents, her supporters and others interested in promoting her candidature, and "by reason of other circumstances" (particulars of which were to be furnished later), the majority of electors were prevented from electing the candidate whom they preferred.

The respondent moved for a dismissal of the petition on the ground that the security of Rs. 5,000/- deposited was inadequate as the petition contained more than three charges and Rule 12(2) of the Order-in-Council had not been complied with.

Held: (1) That everyone of the grounds set out in section 77(*a*) constitute a separate and distinct charge.

(2) That those matters which do not come under "misconduct" but still affect the result of the election would be "other circumstances", *e.g.*, a flood, a cyclone, the collapse of a bridge, any factor which prevents voters from proceeding with reasonable safety to a polling booth. Such circumstances would constitute a distinct charge.

(3) That the petition contained more than three charges and as the petitioners had failed to deposit security as provided for in Rule 12(2) in the Third

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Schedule to the Order-in-Council, 1946, the petition must be dismissed.

PERERA *v.* BANDARANAIKE 73

Election Petition—Charges of bribery, undue influence and a further allegation that by reason of "misconduct on the part of the respondent, his agents, supporters and political connexions and by reason of other circumstances" majority of voters prevented from electing the candidate they preferred—Does this further allegation contain one charge or more than one —Adequacy of security—Ceylon (Parliamentary Elections) Order-in-Council, 1946, *section* 77(*a*)*—Rule* 12 *of Election Rules in Third Schedule.*

In addition to charges of bribery and undue influence an election petition contained the following paragraph:

"Your petitioner further states that by reason of misconduct on the part of the respondent, his agents, supporters and political connexions and by reason of other circumstances, the majority of electors were or may have been prevented from electing the candidate whom they preferred."

The respondent moved for the dismissal of the petition under Rule 12(3) of the Parliamentary Election Rules on the ground that sufficient security had not been given by the petitioner as required by Rule 12.

It was contended for the respondent that the allegations set out in the above paragraph contained at least two charges and, therefore, the security, deposited in a sum of Rs. 5000/- was inadequate. The contention on behalf of the petitioner was that it contained only one charge.

After reviewing the previous relevant decisions of the Supreme Court, His Lordship —

Held: That the "other circumstances" referred to in the paragraph aforesaid formed a group of facts different from "misconduct" and, therefore, the petition contained more than three charges. The Security given being only Rs. 5,000/-, the petitioner had failed to comply with Rule 12 and consequently the petition must be dismissed.

PERERA *v.* SAMARASINGHE 75

Ceylon (Parliamentary Elections) Order-in-Council, 1946, *section* 77 *and Rule* 12(2) *in Third Schedule —Petition challenging the election of respondent—Two charges set out in paragraphs* 3 *and* 4 *respectively, of petition—Reference to "other misconduct" in paragraph* 5 *of the petition—Adequacy of Rs.* 5,000/- *deposited as security—Meaning of the terms "charges" in Rule* 12(2) *and "other misconduct" in section* 77.

Held: (1) That the expression "charges" in rule 12(2) means only those of the grounds set out in section 77 which fall within the category of the corrupt or illegal practices specified or included in that section.

(2) That the expression "other misconduct" occurring in paragraph 5 of the petition includes 2 charges *i.e.* of corrupt practice and illegal practice. It was not intended to indicate only one other form of misconduct, but included all other forms not earlier specified.

(3) That, therefore, there being four charges, the amount of security deposited, viz., Rs. 5,000/- was inadequate, and the petition must be dismissed.

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Ceylon (Parliamentary Elections) Order-in-Council, 1946*—Parliamentary Election Rules, Rule* 4 (1) (*b*)*—Facts and grounds—Rule* 12(2)*—Adequacy of security —Number of charges—Motion for dismissal of petition for insufficiency of security.*

Held: (1) That it was sufficient compliance with the provisions of rule 4(1)(*b*) if the petitioner has, in a single averment, stated both facts and grounds relied on to sustain the prayer.

(2) That an averment as to the commission of an offence by persons in the alternative does not offend rule 4(1)(*b*).

(3) That the expression "charges" in rule 12(2) refers to various forms of misconduct coming under the description of corrupt or illegal practices under the Ordinance.

(4) That the allegation of bribery, being a corrupt practice under section 58 of the Ordinance, constitutes a charge, and although several instances or causes of bribery may be alleged, they would constitute but one charge for the purposes of rule 12(2).

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Cheque

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Civil Law Ordinance

Section 3*—Is tort of conversion part of the Law of Ceylon.*

SILVA *v.* APPUHAMY AND OTHERS 26

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Civil Procedure

Civil Procedure—Default of appearance of plaintiff on date of trial—Proctor stating to Court that he had made application for revocation of his proxy—No mention of his not appearing for plaintiff or that he had no instructions—Judge entering "decree nisi" — Is such decree valid ?

Held: That no *decree nisi* could be entered against an absent plaintiff on the ground that he was unrepresented merely because his proctor, whose proxy was still on record, stated to Court on the trial date that he had applied for a revocation of the proxy granted to him, without informing the Court that he was not appearing for his client or that he had no instructions from him.

WIJESINGHE *v.* MENIKA 72

See also under—MORTAGE ACT

Civil Procedure Code

Section 85—*Default of appearance of the defendant —Whether defendant can purge his default before entry of decree nisi.*

Summons was served on the defendant returnable on 29th August, 1962, but the defendant was absent on this date. The action was thereupon fixed for *ex-parte* trial for 30th October, 1962. Before that date the defendant applied to Court for permission to file proxy and answer stating certain reasons for his absence on 29th August, 1962. After inquiry the trial judge made order refusing the application, taking the view, firstly, that the defendant had not sufficiently excused his default, and secondly, that it was open to him to excuse his default only after entry of *decree nisi.* On appeal —

Held: Affirming the order of the trial judge, that the defendant had not sufficiently excused his default.

Per CURIAM—It is open to a defendant to appear and attempt to excuse his default before entry of decree nisi.

EDIRISINGHE *v.* GUNASEKERA 110

Section 218—*Clause (k) in proviso to this section—Meaning of term "contingent right" contained therein.*

The question for determination in the present case was whether a certain property could be seized and sold as against the judgment-debtor, one *R.* The position taken up by *R.* was that his interest in the property was not seizable in terms of section 218(*k*) of the Civil Procedure Code as it had not vested but was merely contingent. *R.* derived his interest in the property in terms of Last Will, No. 147, executed by his grandfather. The said Will created a trust, *R.* being one of the beneficiaries, and also it provided *inter alia* that these beneficiaries were not entitled to receive the income arising from their shares until the trust ceased as provided by the Will.

Held: (1) That the term *contingent right* in section 218(*k*) of the Civil Procedure Code means a right which is conditional as contrasted with a vested right which is a certain or assured right.

(2) That on a reading of the Last Will which created a trust it was clear that the beneficial interest vested in *R.* during the continuance of the trust, its enjoyment only being postponed until the death of the last of the trustees. The said interest of *R.* was, therefore, not a contingent interest within the meaning of section 218(*k*).

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Court of Criminal Appeal

Desirability of amending Court of Criminal Appeal Ordinance to provide for appeal against acquittals.

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Court of Criminal Appeal—Charges of conspiracy to commit murder and murder—Several accused—Case for defence not adequately placed before Jury in summing-up—Demeanour of witness dealt with in summing-up—Contradictions not properly dealt with—Misdirection and non-direction regarding corroboration—Case of each accused not considered separately —Value of corroborative evidence—Nature of corroboration required—Accused deprived of substance of fair trial—Duty of trial Judge in expressing opinions—Why re-trial not ordered.

In this case, eight accused were indicted on three counts. The first count was for having conspired to commit the murder of one Silva between 20th July, 1962, and 21st August, 1962. The second and third counts charged them with the murder of Silva and one Punchimahatmaya between the 20th and 21st August, 1962. All the accused, except the 8th accused, were convicted on all counts.

The case for the prosecution rested almost entirely on the evidence of a witness, Daniel. It was accepted by the prosecution and the trial judge that on his own evidence Daniel was a self-confessed accomplice.

The following grounds of appeal were urged at the hearing of the appeal:—

(1) that the Jury were misdirected and misled by the learned Commissioner of Assize in his charge, on a vital issue of law, viz.: (*a*) the proper approach to the evidence of an admitted accomplice: and (*b*) what constitutes corroboration of an accomplice;

(2) the learned Commissioner should have made it clear to the Jury that there was no independent

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evidence of corroboration. He had, instead, made them believe that what could not constitute corroboration was, in fact, corroboration;

(3) the summing up, as a whole, did not deal adequately with the evidence and was not fair to the accused; and the facts were dealt with in such a way as to favour the prosecution theory; and

(4) the case for the defence on the facts was not adequately placed before the Jury.

Held: (1) That the complaints that the summing-up was unfair to the accused and that the case for the defence on the facts was not adequately placed before the Jury were borne out in several respects. These included:—

(*a*) An indication by the Commissioner plainly, on the logic of his reasoning, that there was no cause for the accomplice to kill Silva, whereas the defence had suggested a strong motive for his doing so, and the fact that it was not left to the Jury to decide the matter for themselves;

(*b*) One assumption followed another, but each theory put forward was treated as proved, and the final conclusion was then stated as though it was the only possible one;

(*c*) A strong point which the defence had made against the credibility of the accomplice was whittled down and the Jury were clearly told that his untruthfulness on a certain point was pardonable;

(*d*) The demeanour of the accomplice in the witness-box was dealt with instead of leaving it to the Jury to decide for themselves what impression his demeanour had made on them:

(*e*) After very apposite comments regarding the accomplice's account of the incidents of the relevant night, which should have made the Jury suspect the truth of his story by reason of the improbabilites therein, he told them that the very improbability of the story was a guarantee of its truth and sought to explain away the defence suggestions on that matter;

(*f*) The points made by the defence against the evidence of the accomplice in regard to the meeting between some of the accused at which they were alleged to have conspired to commit murder were not fairly dealt with in the summing-up;

(*g*) Contradictions even on material points which should have shaken the veracity of the accomplice, were either not dealt with or were unfairly treated as points in his favour, and the witness was held up as a witness of truth. The explanations given by the Commissioner and the emphasis laid by him on the side of the truthfulness of that evidence did not appear to leave very much for the judgment of the Jury as to the credibility or otherwise of the accomplice;

(*h*) On a number of matters, the Commissioner had gone to the defence of the accomplice and had nothing favourable to say about the defence criticisms of his evidence on those matters.

(2) That the manner in which some of the necessary directions on matters of law were conveyed to the Jury, and the omission to direct the Jury on some matters of law also made the summing-up unfair and showed that the mind of the Commissioner was not alive to matters favourable to the defence. Thus:—

(*a*) In the directions concerning the evidence of an accomplice, unusual stress was laid on the point that corroboration of such evidence is not an essential requirement. This was frequently repeated but the gravity of a decision to convict on such uncorroborated evidence was not stressed;

(*b*) Having thus expressed himself, it was the duty of the Commissioner, to draw special attention to aspects of the accomplice's conduct and which could shake confidence in his credibility;

(*c*) Though a proper direction was given at an early stage regarding the approach to the evidence of a witness in a case where it is shown clearly that some part of his evidence is false, the vital question whether, if the accomplice's evidence was false on some material points, it would be safe to convict upon his testimony which was, in fact, very nearly uncorroborated, was not directly posed to the Jury, and the example quoted by the Commissioner for their guidance was one which could only have induced an attitude favourable to the prosecution;

(*d*) No distinction was drawn between the cases of those accused against whom there was the direct testimony of the accomplice on the count of conspiracy, and the other accused, in whose case, a finding on that count could depend only on an inference from their alleged conduct on the night of the murders.

(3) That even though evidence that four of the accused were seen by another witness in a car at a point about three-fourths of a mile from the scene of the offence, about 1 1/2 hours after the time when they were alleged to have gone in a car and met the accomplice, may be legally admissible for the purpose of corroboration, its probative value as corroboration might be very slight or even nil, and it could not go far to connect or tend to connect those accused with the offences charged or to confirm the accomplice's evidence against them in a material particular.

(4) That it was a grave omission not to tell the Jury that the evidence of the accomplice was not corroborated in any way by any witness as against three of the other accused.

(5) That a clear direction is always necessary that the corroboration that the law requires is corrobora-

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tion in some material particular tending to show that *each* accused committed the crime charged.

(6) That the evidence of another witness that one of the accused asked him to say that he saw one of the deceased alive on the morning after the murder could be considered corroboration of the evidence of the accomplice because, in the absence of any explanation from that accused, it indicated that he was trying to fabricate evidence to show that the murder took place long after its actual commission.

(7) That looking at the charge, as a whole, it could be concluded that it was of such a character as to deprive the appellants of the substance of a fair trial, inasmuch as:—

(*a*) the Commissioner dealt with the attacks of the defence on the credibility of the accomplice in such a way as virtually to render such attacks harmless and impotent;

(*b*) the accused thereby ran the grave risk of the accomplice's uncorroborated evidence being acted upon;

(*c*) the Commissioner expressed his opinions very freely in his charge and there was some ground for the complaint that the defence suggestions were not favourably or fairly dealt with.

(8) That a re-trial should not be ordered in this case because a period of over three years had lapsed since the commission of the offence, and because of the unreliable nature of the accomplice's evidence on which alone the prosecution rested.

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Court of Requests

Court of Requests—Application for declaration of right of way—Damages for obstruction of said right of way—Jurisdiction of Court of Requests—Rural Courts Ordinance, section 9, First Schedule.

Held: That the proper Court in which to institute an action for a declaration of a right of way and for damages for obstruction of the said right of way, is the Court of Requests and not the Rural Court.

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Courts Ordinance

Section 36—Is it imperative that appeals and applications to the Supreme Court should be heard in Colombo only.

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Courts Ordinance, (Cap. 6), section 20—Application for Injunction praying for order on respondents to refrain from removing petitioner from Ceylon pending institution of proposed action in District Court against refusal to grant a valid "residence visa"— What the Court has to consider.

The petitioner prayed for an Injunction under section 20 of the Courts Ordinance ordering and directing the respondents to refrain from removing him from Ceylon pending the determination of an action which he proposed to institute in the District Court against them and of which he had given notice under section 461 of the Civil Procedure Code.

He also averred—

(*a*) that the 2nd respondent who is the Controller of Immigration and Emigration "acting wrongfully and unlawfully and in excess and/or abuse of his powers has refused to grant him a valid residence visa";

(*b*) that irremediable mischief might be caused to him if he were removed before he could bring the proposed action in the District Court.

The second respondent in his affidavit stated that he refused to grant the petitioner a residence visa in the *bona fide* exercise of the discretion vested in him

Held: (1) That the petitioner was not entitled to the injunction asked for, as he failed to establish that irremediable mischief would be caused to him by his removal from Ceylon and that any cause of action had accrued to him to sue the respondents in the contemplated action.

(2) That in the present application, the Court must be satisfied not only that irremediable mischief would be caused to the petitioner by his removal but also that he had a valid cause of action against the respondents.

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Criminal Law

Criminal Law—Appeal on question of fact—Principles on which a Court of Appeal should interfere.

Right of appeal against acquittals—Desirability of amending Court of Criminal Appeal Ordinance providing for right of appeal against acquittals.

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Held: That a Court of Appeal can interfere with a finding of fact only when it can say that no reasonable man can reasonably come to the conclusion which the trial judge arrived at in the case.

Per SRI SKANDA RAJAH, J.—"The right of appeal against acquittals may, in the public interest, be put to more use. Also it seems desirable to amend the Court of Criminal Appeal Ordinance giving the Crown the right to appeal against acquittals, unreasonable verdicts and inappropriate sentences."

S.I. POLICE BORELLA v. ELIYATAMBY .. 48

Right of prosecution to call witness not on the back of the indictment and who has not given evidence in Magistrates' Court—Need to give adequate notice to defence and sufficient opportunity for preparation to cross-examine such witness—Effect of failure to do so.

QUEEN v. ANTHONYPILLAI 57

Criminal Procedure

See under—CRIMINAL LAW 57

See also under—CRIMINAL PROCEDURE CODE .. 53

Criminal Procedure Code

Sections 190, 191 *and* 330—*Order discharging accused as material witness for prosecution not available—Second plaint on the same charge—Is it open to the accused to raise plea of "autrefois acquit" Acquittal under section* 190 *to be on the merits.*

The accused-appellant was convicted in case No. 14038, Joint M.C., Colombo, of attempting to cheat. On an appeal preferred by him to the Supreme Court the conviction was quashed and the case was sent back for re-trial. The re-trial was fixed for 25th January, 1960, on which date the Magistrate directed the case to be called on 9th February, 1960. A material witness for the prosecution was absent on this date and the complainant informed the Magistrate that the witness would not be available for a year for his evidence to be taken. Thereupon the Magistrate made order discharging the accused recording that it would not be fair to keep the charge hanging over the accused for another year.

On the accused being charged again for the same offence his proctor raised a plea of *autrefois acquit*, which the Magistrate rejected. On an appeal from this last order.

Held: (1) That the learned Magistrate was right in rejecting the plea of *autrefois acquit*.

(2) That where a Magistrate for reasons stated in his order discharges an accused person in terms of section 191 of the Criminal Procedure Code, such discharge can amount only to a discontinuance of the proceedings against the accused and does not have the effect of an acquittal.

(3) That an acquittal under section 190 of the said Code means an acquittal on the merits.

Per T. S. FERNANDO, J.—"There are, of course, acquittals other than on the merits that are recognized by the Code, *i.e.*, those referred to in sections 194, 195 and 290. These, to use a phrase suggested to us by Crown Counsel, may be conveniently referred to as 'statutory' acquittals, the term 'acquittal' being employed in those three sections in order to attract the provisions of section 330 of the Code and thereby avoid a person accused being twice vexed."

DE SILVA v. JAYATILLEKE, INSPECTOR OF POLICE FORT 1

Criminal Procedure Code, section 328, *read with section* 4 *of the Ceylon (Constitution) Order-in-Council, (Cap.* 379), *and section* 10 *of the Letters Patent, (Cap.* 388).

His Excellency the Governor-General's powers to quash a conviction—Effect of a Free Pardon.

Magistrate's right to quash a conviction.

The accused-petitioner, after the dismissal of an appeal by him from a conviction and sentence of a fine, made representations to His Excellency the Governor-General and received a reply stating that "the sentence imposed on him has been set aside". Not being content with this, he further petitioned His Excellency to which he received a reply to the effect that not only the sentence, but also his conviction was quashed by His Excellency.

The accused's proctor filed a motion and petition from the accused and moved that the conviction be set aside by the Magistrate, who referred the case to the Supreme Court for a direction as to how he should act in the matter.

Held: (1) That the Magistrate was right in sending the matter to the Supreme Court, but he would have been perfectly right if he refused the application, for he cannot quash a conviction entered by him, much less, when affirmed by the Supreme Court.

(2) That quashing a conviction involves an exercise of judicial power and His Excellency could not exercise such judicial powers; but the undisputed right of His Excellency to grant a Free Pardon has the effect of wiping out the conviction also.

QUEEN v. WIMALADHARMA 14

Criminal Procedure Code, sections 178, 180, 181 *and* 184—*Charges of being members of an unlawful assembly and of committing offences in prosecution of its common object—Offences under sections* 140, 434 *read with section* 146, *sections* 144, 314 *read with section* 146 *of the Penal Code.*

Additional charges at the same trial against the same accused under sections 434, 314, 333 *and* 315 *of the Penal Code for offences alleged to be committed in the course of the same transaction as set out in the charges based on said unlawfu ll assembly—Is there a misjoinder of charges —Can charges based on the existence of an unlawful assembly be joined with charges framed relying on section* 32 *of the Penal Code.*

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Six accused persons were charged with being members of an unlawful assembly the common objects of which were to commit house-trespass and to cause hurt, an offence punishable under section 140 of the Penal Code. Further, they were charged with committing house-trespass, rioting by using violence and force by assaulting, and causing hurt, as members of the said unlawful assembly, offences punishable under section 434 read with section 146 of the Penal Code, section 144 of the Penal Code and section 314 read with section 146 of the Penal Code, respectively.

In addition to the above, relying on section 32 of the Penal Code, the same accused persons were charged at the same trial with offences under sections 434, 333, 314 and 315 of the Penal Code all alleged to have been committed in the course of the same transaction set out in the above charges based on an unlawful assembly.

Five of the accused were convicted and on an appeal to the Supreme Court, where the only material point argued on behalf of the appellants was that there had been a misjoinder of charges in that charges based on the existence of an unlawful assembly had been joined with charges framed relying on section 32 of the Penal Code, T. S. Fernando, J., dismissed the appeals.

With special leave obtained, one of the accused appealed to the Privy Council. The main contention on behalf of the appellant has been summarised by Their Lordships thus: "It is said that though section 146 of the Penal Code creates a liability on a member of an unlawful assembly for an offence committed by another member of such an unlawful assembly in prosecution of the common object, yet it does not create an offence distinct from the offence committed by the other member. Accordingly it is said that though certain charges, *e.g.*, charges 2 (charge under 434 read with 146) and 5 (charge under 434) were for the purposes of section 178 of the Criminal Procedure Code charges of distinct offences which required separate charges and required separate trials they did not come within 180(1) because they did not for the purposes of that section involve 'more offences than one'."

Held: (1) That the aforesaid charges based on unlawful assembly and those based on section 32 of the Penal Code are distinct offences. They could be joined at the same trial as the offences were committed "in one series of acts so connected together as to form the same transaction" within the meaning of section 180(1) of the Criminal Procedure Code. Section 180 is an exception to section 178 of the Criminal Procedure Code which requires separate charges and separate trials in the case of distinct offences.

(2) That it is a question for decision in any particular case whether the facts out of which charges have arisen are so closely connected and inter-related that it can fairly be said that there was one series of acts and that the acts by being connected constituted one and the same transaction.

Per The Judicial Committee:—

(*a*) "That it is well recognised that section 32 of the Penal Code expresses and declares a legal principle of law, but does not create a substantive offence."

(*b*) "Whether a person has, in fact, committed an offence which he does not admit is the very question with which a trial is concerned. Their Lordships consider, therefore, that it cannot be doubted that the words 'more offences than one are committed' must mean and must be understood as meaning more offences than one are alleged to have been committed."

Khan *v.* Ariyadasa 17

Section 188—*How should a plea of guilt be recorded by a Magistrate.*

Where a plea of guilt is recorded as follows: "Accused states, 'I am guilty' under section 325."

Held: (1) That the plea had not been recorded as required by law.

(2) That where an accused person makes an admission of guilt, the accused's statement shall be recorded as nearly as possible in the words used by the accused as required by section 188 of the Criminal Procedure Code.

Perera *v.* Zulaiha 45

Section 287—*Application for postponement, as accused not ready for trial—Time to retain Counsel.*

Held: That the right of a person who is accused of a criminal offence to be defended by a lawyer of his choice is one now ingrained in the Rule of Law which is recognised in the law of criminal procedure in most civilized countries and is one expressly recognised by section 287 of our Criminal Procedure Code.

Premaratne *v.* Gunaratne 53

Common intention—Failure to allege vicarious liability in the charge—Effect thereof—Criminal Procedure Code, sections 176, 168, 169—*Penal Code section* 32.

Ariyadasa *v.* The Queen 97

Section 171—*Price Control Act—Charge of selling tamarind in excess of maximum controlled price—Failure to mention penal provision in charge sheet though referred to in report to Court under section* 148 (1)(*b*) *of Criminal Procedure Code—No evidence led as to whether tamarind sold was imported tamarind or local tamarind—Acquittal of accused—Is the failure to mention the penal section a fatal irregularity—Burden of proof.*

Where an accused was charged with having sold half a pound of tamarind for a price in excess of the maximum controlled price and after trial was acquitted on the grounds: (*a*) that the charge sheet omitted to mention the penal section; and (*b*) that there was no evidence as to whether this was imported tamarind or local tamarind,

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Held: (1) That the failure to mention the penal section did not constitute an illegality as the accused was aware that he was being charged under the Price Control Act and the charge sheet contained a reference thereto. (*Vide* section 171 of the Criminal Procedure Code).

(2) That it was not obligatory on the prosecution to prove that the tamarind sold was imported tamarind, because what was price-controlled was not merely imported tamarind, but also local tamarind.

WICKRAMASINGHE *v* CHANDRADASA 103

Section 418—*Need to make use of this provision in cases where dispossession of immovable property is attended with criminal force.*

INSPECTOR OF POLICE, GAMPAHA *v.* GOMIS THISSERA 112

Debt Conciliation Ordinance

Debt Conciliation Ordinance, section 56—*Application for relief—"Any matter pending before the Board"—Bar of civil action.*

An application for relief was made by the defendants to the Debt Conciliation Board dated 24th November, 1962, and was received in the office of the Board on 26th November, 1962. The plaint was filed in the District Court on 10th December, 1963.

Held: (1) That the word "pending" in section 56 of the Debt Conciliation Ordinance means, "awaiting decision or settlement".

(2) That from 26th November, 1962, which was the date on which the application was received in the office of the Board, the application was awaiting a decision on it by the Board, and was, therefore "pending" before the Board.

PONNIAH *et al v.* RAJARATNAM 50

Delict

See under—ROMAN-DUTCH LAW .. ..

Donation

Donation—"Jus Accrescendi"—Does the principle apply to deeds of gift

Held: (1) That it is well settled law that the principle of *jus accrescendi* does not apply to deeds of gift.

(2) That if, however, the terms of the deed clearly indicate that there should be such an accrual, then the Courts would give effect to it.

JAYASINGHE AND ANOTHER *v.* RANSO NONA .. 6

To minors—Income therefrom—Can it be utilized to pay premia on insurance policies which would benefit minors.

FONSEKA *v.* FONSEKA AND OTHERS 10

Dying Declaration

See under—EVIDENCE.

Election Petitions

See under—CEYLON (PARLIAMENTARY ELECTIONS) ORDER-IN-COUNCIL. .. .. ..

Evidence

Evidence Ordinance, section 56—*Can Court take judicial notice of the fact that "arrack" is an "excisable article"*

Held: That a Magistrate is entitled to take judicial notice of the fact that "arrack" is an "excisable article".

Per SRI SKANDA RAJAH, J.—"Perhaps the charge would have been better framed if it had referred to the sale of "an excisable article, to wit, arrack".

CHALOSINGHO *v.* S.I. CRIMES, AMPARAI .. 46

Evidence Ordinance, section 32(1)—*Statement made by a deceased person relating to cause of death—When admissible.*

In the course of a murder trial, the prosecution led in evidence under section 32 of the Evidence Ordinance, three statements made by the deceased on the following dates:—

30th June, 1962; 8th September, 1962; 14th October, 1962.

The date of the alleged offence was 24th November, 1962.

Held: That the statements were wrongly admitted.

Per T. S. FERNANDO, J.—"A statement of a deceased can only be used as a relevant fact in the limited circumstances set out in section 32 of the Evidence Ordinance. Sub-section (1) of that section permits the admission of a statement made by a person who is dead when that statement relates to the cause of his death or to any of the circumstances of the transaction which resulted in his death."

GUNADASA *alias* CHARLIS & ANOTHER *v.* THE QUEEN 54

Right of prosecution to call witness not on the back of the indictment and who has not given evidence in Magistrate's Court.

QUEEN *v.* ANTHONYPILLAI 57

Dying declaration—Failure by trial judge to caution the jury as to the risk of acting on such evidence and to direct them as to the need to consider with special care the question whether such statement could be accepted as true and accurate.

QUEEN *v.* ANTHONYPILLAI 57

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Evidence—Opinion of expert witness—Failure to elicit facts showing special skill for the purpose—Bare opinion not sufficient—Burden on prosecution—Duty of Court to satisfy itself that witness is an expert, even where prosecution fails to discharge its burden.

On a charge of selling Government Arrack without a licence from the Government Agent, the prosecution led the evidence of a Preventive Officer who identified the arrack in the following terms: "I examined the contents of the bottle .... I am of opinion that it contained Government arrack."

Not a question was put to him either in cross-examination or by the Magistrate in regard to this opinion. At the conclusion of the trial the Magistrate acquitted the accused on the ground that this witness who identified the arrack did not give any reasons as to how he came by his opinion.

The Solicitor-General appealed and it was contended on his behalf that the Magistrate should have accepted the opinion of this witness, once he had satisfied himself that he was competent to testify as an expert unless his opinion had been demonstrated to be unreliable.

Held: (1) That the burden lay on the prosecution to elicit relevant material in order to satisfy the Court that this witness was an expert.

(2) That as the prosecution failed to discharge this burden it was the right and duty of the Magistrate to, question him in order to satisfy itself that the witness is specially skilled on the subject on which he was called to testify.

(3) That in the circumstances of this case the acquittal of the accused was justified.

Per Manicavasagar, J.—"The witness should have been questioned in regard to his experience, the special skill which he claimed to have acquired, the number of instances where he had given his opinion as an expert in Court or elsewhere, the number of cases and the period during which he had testified in Court, and whether there were any cases where his opinion had not been accepted."

Solicitor General *v.* Podisira 70

Burden of Proof—Duty of prosecution to prove the charge—Absence of any burden on the accused to prove his innocence.

Common intention—Failure to allege vicarious liability in the charge—Effect thereof—Criminal Procedure Code, sections 167, 168, 169—*Penal Code, section* 32.

(*A*) Where, in a trial for murder, the accused did not seek to bring himself within the benefit of a general or special exception in the Penal Code, but instead, sought by his evidence to extablish that the deceased met with his death at the hands of a third party, the learned, Judge's summing up contained the following passages :—

(i) "Now, gentlemen, the degree of proof that is required from the defence is not so high as the degree of proof that is required from the Crown. Whereas the Crown has to prove its case beyond reasonable doubt, it is sufficient if the defence proves its case on a balance of probability. If you think that the version of the accused is more probable than the version related by the prosecution witnesses, the defence has discharged its burden. That is the burden that lies upon the defence to prove its case."

(ii) "I have addressed you on the burden of proof that lies upon the defence and I said that it is not necessary that the accused should prove his case with that same high degree of proof that is required of the Crown; but still he has to prove it. You must be satisfied on his evidence that what he is saying is true."

(iii) "The case for the defence is that it was Jamis who struck the fatal blow on the deceased. Then, gentlemen, you have to consider whether the accused's story on that point is true. If you are satisfied, on a balance of probability, that it was Jamis who struck the deceased, then the accused is entitled to be acquitted, because it was not he who caused the fatal injury on the deceased...... So, gentlemen, you will see that the entire case boils down to a very small issue; do we believe Sopihamy or do we believe the accused?"

Held: That the learned Judge has misdirected the Jury on the question of the burden of proof.

Per T. S. Fernando, J.—"It appeared to us that when the learned judge put the issue in the case as one of belief between the evidence of Sopihamy on the one hand and that of the appellant, on the other, he was placing on the appellant a burden which the latter was not obliged in law to carry. If the jury believed the appellant, he was, of course, entitled to be acquitted. He was, in our opinion, also entitled to be acquitted even if his evidence though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt. The evidence he gave at the trial did not affect the cardinal principle of the criminal law that the accused person is presumed to be innocent and the corollary of that principle that the burden of establishing his guilt lay on the prosecution. In the state of the evidence the burden of proof did not shift on to the appellant at any stage of this case."

(*B*) The case for the prosecution was that the appellant inveigled the deceased out of his home on the night in question on a pretext of giving him liquor to drink, that the appellant and Jamis both came together to the deceased's home to take him away and that when he had been taken into the compound itself. The medical evidence was to the effect that the deceased had sustained a number of injuries which could not all have been caused with one weapon but must have been caused with, at least, two weapons one blunt and the other sharp cutting. The fatal injury was due to a blow with a blunt weapon and, if more than one person had taken part in the assault upon the deceased, the prosecution was not able to

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establish that it was the appellant and not some other who had caused that injury.

The charge contained in the indictment was in the following terms:—

"That on or about the 1st day of October, 1963, at Kirindallahena, Lewala Pahala, in the division of Galle, within the jurisdiction of this Court, you did commit murder by causing the death of Elpitiya Vithanage David, and that you have thereby committed an offence punishable under section 296 of the Penal Code."

Counsel for the appellant argued that he was called upon according to the terms in which the charge had been framed only to meet a case where the allegation was that the death of the deceased was caused by him, and that, in the absence of any reference to section 32 of the Penal Code in the charge itself, he was not required to defend himself on a charge which implied that he was vicariously responsible for the criminal act of another.

Counsel for the Crown submitted that section 169 of the Criminal Procedure Code read with its illustration indicated that a charge such as the one in the present case was in conformity with the law.

Held: That the charge as framed gave the appellant, having regard to the circumstances of this case, such particulars of the charge as he was entitled at law to receive.

ARIYADASA *v.* THE QUEEN 97

Excise Ordinance

Excise Ordinance, section 37—Entry by Police on premises of accused without search warrant purporting to act under section 37—Failure to produce proof of compliance with the requirements of the section—Conviction of accused for obstructing police officers in the lawful exercise of their duties—Can conviction be sustained?

The Police entered the premises of the 2nd accused on information that the accused was in possession of unlawfully manufactured liquor. The police did so without a search warrant, purporting to act under section 37 of the Excise Ordinance. At the trial the prosecution failed to produce proof of compliance with the requirements of section 37.

Held: That the entry by the police on the premises of the accused was *prima facie* illegal and, therefore, a conviction on a charge of obstructing the police in the lawful exercise of their duties could not be sustained.

SIRISENA *et al. v.* WARAKAGODA 52

Executors and Administrators

Executors and adminstrators—Money to be brought in to the credit of two minors in a testamentary case—Payment of this money by administrator to his Proctor for deposit in the case—Cheque payable to Proctor—Money misappropriated by Proctor—Whether estate of deceased administrator liable to refund the said sum of money to the minors—Should cheque have been drawn in Proctor's favour—Trusts Ordinance, (Cap. 87), section 15.

Minors—Gift of two properties to minors— Income therefrom—Can it be utilised to pay premia on insurance policies which would benefit minors?

The appellant was the executor of the estate of one C. E. Fonseka and the 1st respondent was the widow of the deceased. Two properties had been gifted by the deceased to the 2nd and 3rd respondents (his minor children by a former marriage) and the first question that arose was whether the rents from these, which rents admittedly came into the deceased's hands should be paid to them out of the estate. These sums had undoubtedly not been placed to the credit of the minors by the deceased, but it was submitted that he had utilised these sums to pay the premia on two insurance policies which would benefit them.

Held: (1) That the insurance policies and the rents from the properties were two separate and distinct benefits which the minors were entitled to claim. Even if the deceased had paid the premia on the policies out of the rent he would still not be absolved from the duty of holding the rent for the minors.

When the deceased's first wife died he had had in his hands a sum of money due from her to their two minor children (2nd and 3rd respondents). Her estate was administered in D.C. Colombo, Case No. 13410/T and the deceased was the administrator. This sum had not been brought in to the credit of the minors in the testamentary case and the appellant (the deceased's executor in the present case) had paid it out of the estate.

It appeared that the deceased had made out a cheque for this sum payable to his proctor and handed it to him. The latter had misappropriated it. It was submitted on behalf of the 1st respondent that the deceased's estate was not liable and that his liability had ceased when he handed over the money to his proctor in that case. It was conceded that as far as this money was concerned the deceased was in the position of a trustee.

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It was also pointed out on behalf of the 1st respondent that the money had been handed over to the person who was the deceased's proctor in that testamentary case and that payments into Court could only be made through the proctor on record, according to the rules relating to payments into Court.

Held: (2) That in adopting the course of drawing the cheque in favour of his proctor, the deceased took an unnecessary risk which placed the minors in peril. Inasmuch as the deceased had been a person with some experience in business affairs, he knew or ought to have known where this money which belonged to the minors had to be sent and that it had to be credited to the Government Agent. In these circumstances it was impossible to say as was said in the case of *Speight* v. *Gaunt*, that there was "a moral necessity or sufficient practical reason" for drawing up the cheque in the proctor's favour.

(3) That therefore, the Executor (appellant) had rightly paid this sum out of the deceased's estate.

FONSEKA *v.* FONSEKA AND OTHERS 10

Fideicommissum

Fideicommissum—Clause "si sine liberis decesserit" —Whether Last Will containing such clause created fideicommissum—Indenture between husband and wife for the division of the wife's estate—Dispute with regard to the division after the death of husband and wife—Arbitration and award in respect thereof—Effect of award on terms of Last Will.

The plaintiffs brought this action for a declaration of title to Raglan Estate. Their case was that the Estate formed part of the property of one Adelene Winifred Peiris (hereinafter referred to as the testatrix) who died in December, 1918, leaving a Last Will. By this Last Will she made certain bequests to her daughter, and then bequeathed the residue of the property to her sons in equal shares subject to the following conditions:—

"(*b*) Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to devolve upon his surviving brothers and the children of any deceased brother such children only taking among themselves the share to which their father would have taken or been entitled to if living subject, however, to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one-fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

(*c*) If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be *entitled to* and receive one-fourth of the nett income of the property to which her children would be entitled to under this my Will."

The case of the plaintiffs (who were the children of one son of the testatrix, Richard Louis), was that Raglan Estate was covered by this residuary bequest to the sons of the testatrix, who were three in number, and who all survived the testatrix.

However, on 31st May, 1917, the testatrix and her husband entered into an Indenture by which she agreed to bind herself, her heirs, executors and administrators that her properties shall be distributed and settled in the manner mentioned in the, Indenture. Paragraph 11 of this Indenture provided that, within three months of the date of the Indenture, or whenever thereafter called upon by her husband, she shall convey by way of gift to her eldest son, Richard Louis, her Moragolla Group of Estates, which (according to the plaintiffs) included Raglan Estate. The agreement contained in the Indenture was never carried out. After the death of the testatrix and her husband, disputes arose among her heirs as to the distribution of her property, and they were referred to arbitration, and the award of the arbitrator was made a rule of Court. The award declared that although the agreement in the Indenture was never carried out, yet it was binding on the heirs of the testatrix. For the purposes of deciding this appeal it was accepted that the three sons who were entitled to equal shares of the residuary estate under the Last Will took instead the properties which the testatrix had agreed to transfer to them by the Indenture. On this basis (with which the defendants did not disagree) Richard Louis took the entirety of Moragolla Group because of the Indenture of 1917 and the award of the arbitrator, and his two brothers took other properties in lieu of shares in the residuary estate. In 1951 Richard Louis had sold Raglan Estate, and that title had devolved on the defendants. The plaintiffs claimed that Richard Louis had no power of alienating the property because the conditions set out above created a *fideicommissum* in their favour, and that on the death of Richard Louis in 1957 title vested in them. The learned trial Judge held that "the Last Will created a *fideicommissum* in favour of the plaintiffs, but the disposition of the property was by the Indenture," and held in favour of the plaintiffs. The first defendant appealed, and in appeal put forward three alternative arguments.

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Firstly, that even if the Last Will created a *fidei-commissum*, the property which Richard Louis took by virtue of the Indenture and award was free of the *fideicommissum*, because of the effect of the Indenture was to render the Last Will inoperative, at least, as regards the properties specifically mentioned in the Indenture.

Secondly, that even if the *fideicommissum* attaches, it can affect only a one-third share of Raglan Estate, since that was the only interest in Raglan Estate which was devised to Richard Louis under the Last Will.

Thirdly, that the Last Will did not create a *fidei-commissum* in favour of the plaintiffs.

Held: (1) That the first argument failed because, in the assumption that the Last Will created a *fidei-commissum*, then immediately it was admitted to probate its provisions became operative, and created a *fideicommissum* in favour of the children of Richard Louis, born and unborn. The rights of those *fideicom-missaries* could not thereafter be prejudiced by any act or compromise on the part of Richard Louis, except a *bona fide* compromise concerning the division or distribution of the estate among the three devisees.

(2) That the second argument failed because the original one-third share of the residue became con-verted Raglan Estate, subject to the same conditions as were imposed by the Last Will.

(3) That the third argument succeeded, in that the conditions contained in the Last Will did not in the circumstances of this case create a *fideicommissum* in favour of the plaintiffs.

Per H. N. G. Fernando, J. — "It should not be supposed that the judgments in the two recent cases (*de Silva* v. *Rangohamy* and *Rasammah* v. *Govindar Manar*) evince any special readiness of the Courts to uphold the existence of a *fideicommissum* when property is subject to a *si sine liberis* clause. Such a clause is only one circumstance, taken with the others, which may together suffice to establish an intention to make a gift over to the childern of a donee who does not die issueless. Any readiness to assume such an intention from the mere existence of the clause would be in conflict with the principle of construc-tion "*Expressio unius est exclusio alterius*".

Governor-General

Has no power to quash a conviction.

Queen v. Wimaladharma 14

Injunction

See under—Courts Ordinance.

Judicial Notice

Of fact that 'arrack' is an excisable article.

Chalosingho v. S. I. Crimes Amparai .. 46

Judicial Power

Whether Governor-General can exercise

Queen v. Wimaladharma 14

Jurisdiction

Of Magistrate to quash conviction.

Queen v. Wimaladharma 14

Of Supreme Court to hear appeals outside Colombo.

Queen v. Wimaladharma 15

Of Rural Courts to grant declaration of right of way.

Parawathie v. Somapala.. 55

Jus Accrescendi

See under—Donation .. .. ..

Kandyan Law

Kandyan Law—Marriage registered as "deega" prior to Kandyan Law Declaration and Amendment Ordi-nance—Subsequent acquisition of binna rights.

Held: (1) That where a marriage has taken place before the enactment of the Kandyan Law Declaration and Amendment Ordinance, the mere registration of the marriage as a *deega* marriage would not *per se* result in the forfeiture of *binna* rights subsequently acquired by a woman whose marriage is so registered.

(2) That in view of the cogent oral and documentary evidence, the plaintiff, whose marriage was registered as a *deega* marriage, can be held to have regained *binna* rights.

Kumarihamy v Mudiyanse and Others .. 4

Kandyan Law Declaration and Amendment Ordinance

See under—Kandyan Law .. ..

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Landlord and Tenant

Landlord and tenant—Duration of monthly tenancy —Notice to quit—Validity of such notice.

Held: (1) That a monthly tenancy is tacitly renewed at the end of each monthly period unless the contrary is expressed, by the lessor or lessee.

(2) That where a monthly tenancy is to be terminated, a calendar month's notice is deemed "reasonable notice."

(3) That such notice must run concurrently with a term of the letting and hiring and expire at the end of such term.

(4) That where a notice to quit relates to a date after the exact date on which a tenancy terminates, a fresh tenancy automatically commences at the cessation of the previous tenancy and before the coming into operation of the notice which then becomes invalid.

ISMAIL *v.* SHERIFF 60

Letters Patent

Grant of Free Pardon.

QUEEN *v.* WIMALADHARMA. 14

Magistrate

Right to quash a conviction.

QUEEN *v.* WIMALADHARMA 14

Minors

Money to be brought in to the credit of two minors in a testamentary case—Payment of this money by administrator to his proctor for deposit in the case—Cheque payable to proctor—Money misappropriated by Proctor—Whether estate of deceased adminstrator liable to refund said sum to the minors.

FONSEKA *v.* FONSEKA AND OTHERS 10

Gift to minors—Income therefrom—Can it be utilized to pay premia on Insurance policies which would benefit minors.

FONSEKA *v.* FONSEKA AND OTHERS 10

Misdirection

Court of Criminal Appeal—Conviction for murder—Right of prosecution to call witness not on the back of indictment and who has not given evidence in Magistrate's Court—Need to give adequate notice to defence and sufficient opportunity for preparation to cross-examine such witness—Effect of failure to do so.

Evidence — Misdirection — Dying declaration — Failure by the Trial Judge to caution the jury as to the risk of acting on such evidence and to direct them as to the need to consider with special care the question whether such statement could be accepted as true and accurate—Possibility of accident—Need to direct jury thereon—Miscarriage of justice.

The appellant was convicted of the murder of his wife and sentenced to death. The evidence against him consisted of:—

(*a*) a statement by the deceased woman to the Police on 1st September, 1963, to the effect that the appellant poured some liquid smelling of kerosene oil into her mouth, when she opened her mouth at his request to see whether her decayed teeth were removed and whether there were any more to be removed;

(*b*) the opinion of the doctor, who attended on her after admission to the hospital (for two hours only, to wit; 2 a.m. to 4. a.m. on 2nd September, 1963) to the effect, (i) that she had taken some poison of the Folidol type containing parathion, because of the symptoms he noticed on her; (ii) that pneumonia was a probable consequence of the effect on lungs of a poison of the parathion type.

(No evidence was called to speak to her condition and treatment during the period from 4 a.m. on 2nd September, 1963, to her death at 9.15 p.m., on 4th September, 1963).

(*c*) the opinion of the Acting Judicial Medical Officer who held the post-mortem to the effect that death was due to Broncho-pneumonia involving both lungs and acute tracheitis, and possible toxaemia due to round worms.

In this state of the prosecution evidence, application was made to call a new witness not named in the indictment. This was objected to by the defence, but the learned trial Judge after hearing argument granted the application observing *inter alia* that the defence was made aware of the application about a month earlier, that it had the depositions of the medical witnesses, that it could have sought expert opinion, if it chose to, and that there would be no prejudice caused to the defence.

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In consequence of this order, the new witness called was Dr. *A.*, Deputy Judicial Medical Officer, Colombo, a precis of whose evidence was not made available to the defence. He expressed the opinion that death could not have been due to toxaemia caused by round worms, and that the deceased woman must have contracted pneumonia because of the administration of some poison containing parathion.

The learned trial Judge invited the jury to disregard the possibility that toxaemia due to round worms must have been a contributory cause of death, and laid stress on the opinion of the new witness, Dr. A., as to the probable cause of death.

Held: (1) That the prosecution was entitled to call the new witness, Dr. A., though his evidence had not been led in the Magistrate's Court, but the failure on the part of the prosecution to give the defence, adequate notice of the nature of the new evidence and also sufficient opportunity for preparation to cross-examine him had resulted in grave prejudice to the accused.

(2) That it was doubtful whether the jury would have reached their verdict of murder, if there had been before them some evidence concerning the treatment and condition of the patient during the sixty five hours which preceded her death.

Held also: (3) That the failure on the part of the learned trial Judge —

(*a*) to caution the jury as to the risk of acting upon a dying declaration, being the statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate; and

(*b*) to direct the jury that even if the appellant caused the death of his wife by administering some liquid, the burden lay on the prosection to exclude the possibility of accidental administration ;

had resulted in a miscarriage of justice.

QUEEN *v.* ANTHONYPILLAI 57

(*See also under*—COURT OF CRIMINAL APPEAL)

Mortgage Act

Hypothecary action—Mortgaged property sold under decree—Fiscal directed to deliver possession to purchaser—Shortly thereafter, application to recall writ by party acquiring title from mortgagor after "lis pendens" registered—Court allowing such application but order not communicated to fiscal—Second application by same party to be restored to possession allowed by Court—Is such order valid — Mortgage Act, (Cap. 89), *sections* 5, 16, 34, 35, 36, 54 *and* 55.

The appellant purchased a property sold in execution of a hypothecary decree and was placed in possession thereof by the Fiscal on an order of Court. Shortly before delivery of possession by the Fiscal, the Court recalled the writ on a claim made by the respondent on the ground that the mortgagor-defendant had, after the hypothecary decree was entered, transferred the property to her. This order staying execution was not communicated to the Fiscal in time and, therefore, the respondent made application to Court that she herself be restored to possession which was allowed. On an appeal preferred against this order.

Held: (1) That as the plaintiff in the mortgage action had not followed the procedure set out in section 34, 35 and 36 of the Act, the proper order for possession to the purchase should have been made under section 54 of the Act.

(2) That the respondent was not entitled to possess the land as against the purchaser because she, having acquired title from the mortgagor after the registration of *lis pendens* of the hypothecary action, is bound by the hypothecary decree in terms of section 16 of the Act.

(3) That, therefore, the order directing the fiscal to place the respondent in possession of the land must be set aside.

RATNAWEERA *v.* PATABENDIGE AND OTHERS .. 47

Notice

Notice to quit—Validity.

See under—LANDLORD AND TENANT 60

Pardon

Effect of a Free Pardon.

QUEEN *v.* WIMALADHARMA 14

Parliamentary Election Rules 1946

See under—CEYLON (PARLIAMENTARY ELECTIONS) ORDER-IN-COUNCIL

Partition

Partition Act, (Cap. 69), section 53(1)(*b*)—*Obstruction to Surveyor commissioned to partition land—*

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Contempt of Court—Can an instigator not present on land be found guilty

Held: That a person who, without being present on the land at the time, instigates another to obstruct a surveyor acting on a commission issued by Court to partition a land, cannot be found guilty of contempt of Court under section 53 (1) (*b*) of the Partition Act.

PERERA AND ANOTHER *v.* DAYAWATHIE .. 36

Partition action — Whether two partition actions can be pending in respect of the same land at the same time.

Held: (1) That the institution of an action for the partition of a land does not prevent another action from being instituted to partition the same land, so long as the termination of the common ownership is not *res judicata.*

(2) That in any event in the present case, the two lands in respect of which the two actions had been filed, did not appear to be the same.

(3) That, however, the learned trial Judge was right in dismissing the plaintiff's action on the ground that the 11th to 17th defendants had acquired prescriptive title to the land.

SARAM *v.* SARAM AND ANOTHER.. .. 39

Partition Act (Cap. 69), section 2—Two plaintiffs—One entitled to dominium as regards a share only and the other to a usufruct in respect of that share—Action for partition instituted by said two plaintiffs—Is either competent to maintain action.

Where two plaintiffs, one of whom is entitled only to the dominium to an undivided share of a land and the other to the usufruct thereof, institute an action under the Partition Act—

Held : That neither of them is competent to be a plaintiff in view of section 2 of the Partition Act.

AINES *v.* SALMAN APPU.. 68

Partition Ordinance, (Cap. 56, Legislative Enactments, 1938 Ed.), section 5—Commission issued to surveyor to partition land—Requirement of 30 days' notice in proviso to section 5—Whether an imperative provision—Effect of non-compliance therewith.

After decree of partition had been entered in the present case, commission was issued under section 5 of the Partition Ordinance to a surveyor to prepare a scheme of partition. The proviso to section 5 requires the Commissioner who has to prepare such scheme to give at least 30 days' notice before making the partition. It was clear from the record of the case that such notice had not been given. The present appeal was from the order made by the District Judge after inquiry into the scheme of partition prepared by the Commissioner.

It was submitted on behalf of the appellants that this provision regarding notice was an imperative provision. This was a point raised in appeal for the first time and had not been raised at the inquiry before the learned District Judge.

Held: (1) That the Commissioner had not executed his commission according to law inasmuch as he had failed to comply with the provisions of the proviso to section 5 of the Partition Ordinance.

(2) That, therefore the order appealed from should be set aside and a fresh commission issued in terms of section 5.

DAHANAYAKE *v.* ALAHAKOON 69

Partition Action—Final Decree entered—Can Court look beyond Final Decree to decide dispute relating to a lot allotted under it?

By Final Decree entered in 1932 in a partition case, a certain lot was allotted to *P.* and three other defendants. Subsequently a dispute arose with regard to the 1/4th share of *P.* between the appellants and the 5th defendant—the latter contending that the 1/4th share allotted to *P.* should have been allotted to him. The learned District Judge looked beyond the Final Decree and after examining the Interlocutory decree came to the conclusion that the 1/4th-share should have been allotted to the 5th defendant-respondent.

Held: That the learned District Judge erred in looking beyond the Final Decree as a Final Decree is not merely declaratory of the existing rights of parties *inter se* but creates a new title in the parties absolutely against all other persons whomsoever.

LEELARATNE *v.* NIKULAS 111

Penal Code

Sections 32 *and* 140, 144, 146, 314, 315, 333, 434.

KHAN *v.* ARIYADASA 17

Sections 419—*Charge of mischief by fire—Human dwelling house.*

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Held: That a hut erected in the morning and burnt down at 2.00 p.m. on the same day could not be said to be one ordinarily used as a human dwelling within the meaning of section 419 of the Penal Code.

PEDRIS ALIAS DAVID v. TENNEKOON 38

Criminal trespass, Charge of—Fiscal ejecting the accused from certain premises on writ issued by Court and delivering key to plaintiff's agent—Agent entrusting the premises to J. during his temporary absence — Accused entering premises by pushing aside J. and forcing open padlock—Acquittal of accused on the ground that J. was not in occupation of the premises—Penal Code, section 434.

On a writ issued by Court in a tenancy action, the Fiscal ejected the accused from certain premises by putting out his belongings, padlocking the door and delivering the key to an agent of the landlord. The agent left to have his lunch entrusting the premises to *J*. Shortly after, the accused entered the premises by pushing aside *J*. and forcing open the padlock. *J*. immediately complained to the police, who prosecuted the accused for committing criminal trespass. The magistrate acquitted the accused on the ground that *J*. was not in "occupation" of the premises within the meaning of that word in section 343 of the Penal Code. On an application under section 356 of the Criminal Procedure Code by the landlord, who was the aggrieved party, to revise the said order—

Held: That the fact that *J*. was actually present and in charge on behalf of his principal "to control as to who has rights of ingress and egress to the premises" is sufficient to constitute "occupation" within the meaning of section 434 of the Penal Code.

CHANDRASEKERA v. JAYANATHAN 66

Sections 366, 396—*Charges of theft and assisting in the disposal of the stolen article—Can a person be convicted of both* ?

Held: That a person cannot be convicted of both theft and the disposal of that stolen article.

GOMES S.I. POLICE v. BERNARD PERERA .. 72

Section 352—*Kidnapping from lawful guardianship—Nature of kidnapping contemplated under the section —Necessity for clearly defined evidence in proof of offence.*

Held: That in order to establish an offence under section 352 of the Penal Code, it is not sufficient to show that restraint, as contemplated in this section, was exercised in the course of the commission of another offence. The act of restraint should be distinguishable to the extent that the act of kidnapping must be completed before the other act is committed or should be capable of completion even if the other intended act is not actually committed.

QUEEN v. BRAMPY SINGHO .. 95

Section 32—*Common intention—Failure to allege vicarious liability in the charge—Effect of.*

ARIYADASA v. THE QUEEN 97

Prescription

Prescription Ordinance, section 3—*Possession—Nature of evidence required to prove "possession".*

Held: That vague evidence without details, that people "possessed" a land is insufficient to satisfy a Court that there was possession within the meaning of section 3 of the Prescription Ordinance.

ROMANIS AND OTHERS v. SIVETH APPU AND ANOTHER 40

Privy Council Decisions

KHAN v. ARIYADASA 17

Proctor

Administrator paying to proctor money due to minor in testamentary case—Cheque payable to proctor—Misappropriation by proctor — Liability of administrator.

FONSEKA v. FONSEKA AND OTHERS 10

Roman Dutch Law

Delict—Conversion—English Law applicable to tort of conversion is not part of the law of Ceylon.

SILVA v. APPUHAMY AND OTHERS 26

Contract of Letting and Hiring—Requirement of one month's notice to quit to tenant.

ISMAIL v. SHERIFF 60

Rural Courts

Jurisdiction of, to hear application for declaration of a right of way.

PABAWATHIE v. SOMAPALA 55

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Rural Courts Ordinance

Section 9 of Ordinance.

See under—COURT OF REQUESTS 55

Stamp Ordinance

Stamp Ordinance, (Cap. 247)—Certified copies of proceedings in District Court stamped according to value of "Class" of action as set out in Part II—Do such certified copies properly fall under item 24 of Part I, Schedule A —Should they be stamped again when produced in law proceedings according to the "Class" of case and Court in which they are produced as set out in Part II of the Ordinance—Civil Procedure Code, section 205.

DHAMMINDHA NAYAKE THERO *v.* DIAS .. 92

Supreme Court

Jurisdiction of Supreme Court to hear appeals and applications outside Colombo.

QUEEN *v.* WIMALADHARMA 15

Torts

Tort of conversion—Is it part of the law of Ceylon.

SILVA *v.* APPUHAMY AND OTHERS 26

Trusts

Last will creating trust—When interest to vest in beneficiary—Whether contingent right.

See under—CIVIL PROCEDURE CODE 63

Trusts Ordinance

Section 15—Administrator paying minor's money to proctor for deposit in testamentary case—Cheque payable to proctor—Money misappropriated by Proctor—Liability of administrator .

FONSEKA *v.* FONSEKA AND OTHERS 10

Words and Phrases

" contingent right "—in section 218 (*k*) of Civil Procedure Code.

RAMANATHAN *v.* PERERA & OTHERS 63

"misconduct and other circumstances"—in section 77 (*a*) of Ceylon (Parliamentary Elections) Order in Council, 1946, as amended.

PIYASENA *v.* RATWATTE 41

PERERA *v.* BANDARANAIKE 73

PERERA *v.* SAMARASINHGE 75

WIJESEKARA *v.* PERERA 80

" charges "—in Rule 12 of Parliamentary Election Rules.

DE SILVA *v.* GUNASEKERA 101

WIJESEKERA *v.* PERERA 80

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" occupation "—in section 434 of Penal Code.

CHANDRASEKERA *v.* JAYANATHAN 66

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Present : **T. S. Fernando, Sri Skanda Rajah and G. P. A. Silva, JJ.**

L. I. C. DE SILVA *vs.* V. M. P. JAYATILLAKE, INSPECTOR OF POLICE, FORT.

S.C. No. 746 *of* 1961—*Joint M.C., Colombo, No.* 21053.

Argued on : 27.10.64, 11.11.64 and 22.1.65.
Decided on : 11.5.65

Criminal Procedure Code, sections 190, 191 and 330—*Order discharging accused as material witness for prosecution not available—Second plaint on the same charge—Is it open to the accused to raise plea of " autrefois acquit "—Acquittal under section* 190 *to be on the merits.*

The accused-appellant was convicted in case No. 14038, Joint M.C., Colombo, of attempting to cheat. On an appeal preferred by him to the Supreme Court the conviction was quashed and the case was sent back for re-trial. The re-trial was fixed for 25th January, 1960, on which date the Magistrate directed the case to be called on 9th February, 1960. As a material witness for the prosecution was absent on this date, the complainant informed the Magistrate that the witness would not be available for a year for his evidence to be taken. Thereupon the Magistrate made order discharging the accused recording that it would not be fair to keep the charge hanging over the accused for another year.

On the accused being charged for the same offence his proctor raised a plea of *autrefois acquit*, which the Magistrate rejected. On an appeal from this last order.

Held : (1) That the learned Magistrate was right in rejecting the plea of *autrefois acquit*.

(2) That where a Magistrate for reasons stated in his order discharges an accused person in terms of section 191 of the Criminal Procedure Code, such discharge can amount only to a discontinuance of the proceedings against the accused and does not have the effect of an acquittal.

(3) That an acquittal under section 190 of the said Code means an acquittal on the merits.

Per T. S. FERNANDO, J.—" There are, of course, acquittals other than on the merits that are recognized by the Code, *i.e.*, those referred to in sections 194, 195 and 290. These, to use a phrase suggested to us by Crown Counsel, may be conveniently referred to as ' statutory ' acquittals, the term ' acquittal ' being employed in those three sections in order to attract the provisions of section 330 of the Code and thereby avoid a person accused being twice vexed. "

Overruled : *Don Abraham* v. *Christoffelsz*, (1953) 55 N.L.R. 92.
Adrian Dias v. *Weerasingham*, (1953) 55 N.L.R. 135 ; XLIX C.L.W. 7
Edwin Singho v. *Nanayakkara*, (1956) 61 N.L.R. 22 ; LIII C.L.W. 95
Peter v. *Cotelingam*, (1962) 66 N.L.R. 468.

Approved : *Senaratne* v. *Lenohamy*, (1917) 20 N.L.R. 44 ; 4 C.W.R. 293
The Attorney-General v. *Kiri Banda*, (1959) 61 N.L.R. 227 ; LVII C.L.W. 77
Sumangala Thera v. *Piyatissa Thera*, (1937) 39 N.L.R. 265 ; X C.L.W. 110
Fernando v. *Rajasooriya*, (1946) 47 N.L.R. 399 ; XXXIII C.L.W. 80

Other cases referred to:
R. v. *William*, (1942) 44 N.L.R. 73 ; XXIV C.L.W. 115
Jones v. *Director of Public Prosecutions*, (1962) A.C. 635; (1962) 2 W.L.R. 575 ; (1962) 1 A.E.R. 569
Wanigasekera v. *Simon*, (1956) 57 N.L.R. 377.
The Attorney-General v. *Piyasena*, (1962) 63 N.L.R. 489 ; LXI C.L.W. 79
Jacobs v. *London County Council*, (1950) A.C., 361 ; (1950) 1 A.E.R. 737

Colvin R. de Silva with *M. L. de Silva, Miss Manouri de Silva* and *T. Edirisuriya*, for the accused-appellant.

V. S. A. Pullenayagum, Crown Counsel, with *R. Abeysuriya, Crown Counsel,* for the Attorney-General.

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T. S. Fernando, J.

The interpretation of sections 190 and 191 of the Criminal Procedure Code has received the attention of this Court on several occasions in recent years and, on the appeal now before us, our attention has been invited to a number of decisions which seem to take different views on the question as to the stage when a prosecution in a summary trial under the Code can be said to have ended.

Before examining these decisions, it is necessary to set down the following material facts :—

The accused-appellant was charged in case No. 14038 with attempting to cheat, an offence punishable under section 403 read with section 490 of the Penal Code. He was convicted in the Magistrate's Court but, on an appeal preferred by him, the Supreme Court quashed that conviction and remitted the case to the Magistrate's Court for retrial. The retrial was fixed by the Magistrate for 25th January, 1960. On this date a material witness for the prosecution was absent, and the Magistrate directed that the "case be called" on 9th February, 1960. On this latter date, the complainant informed the Magistrate that the witness will not be available for another year for his evidence to be taken. The Magistrate, recording that it would not be fair to keep the charge hanging over the accused for another year made an order discharging him.

The same complainant on 19th February, 1961, presented to the Magistrate's Court a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code alleging the commission by the accused of the same charge as was the subject of case No. 14038. This was the commencement of the proceedings in case No. 21053 from which the present appeal arises. When the accused appeared on summons, his proctor raised a plea of *autrefois acquit*. The learned Magistrate, after hearing argument, made order rejecting the plea. The accused filed this appeal against that order, and the Magistrate directed that the trial do await the decision of the appeal.

Counsel for the appellant relied on the decisions of this Court in *Don Abraham* v. *Christoffelsz*, (1953) 55 N.L.R. 92 ; *Adrian Dias* v. *Weerasingham*, (1953) 55 N.L.R. 135 ; and *Edwin Singho* v. *Nanayakkara*, (1956) 61 N.L.R. 22. Crown Counsel argued that the old Divisional Bench case of *Senaratna* v. *Lenohamy*, (1917) 20 N.L.R. 44, was applicable to the facts of the case we were called upon to decide and that the recent decision in *The Attorney-General* v. *Kiri Banda*, (1959) 61 N.L.R. 227, in which the first two of the three cases relied on for the appellant were not followed sets out the correct interpretation to be placed on section 190. In this last named case, Sansoni, J. (as he then was), analysing the decision of the Court of Criminal Appeal in *R.* v. *William*, (1942) 44 N.L.R. 73, stated that two distinct and unequivocal propositions were there enunciated—viz. : (1) that an order of acquittal cannot be made at a trial until the case for the prosecution has been closed ; and (2) that an order of acquittal which purports to have been made under section 190 must be made on the merits and on no other ground.

In the course of an able and very helpful argument, Crown Counsel contended for the correctness of four propositions which he enunciated as follows :—

(i) The earliest stage at which a Magistrate can convict an accused in a summary trial is after he has taken the evidence for the prosecution, the evidence for the defence (where tendered) and the evidence (if any) which he (the Magistrate) may of his own motion cause to be produced ;

(ii) The earliest stage at which a Magistrate can acquit an accused in terms of section 100 is the same stage at which he can convict him ;

(iii) While it is open to a Magistrate for reasons stated to discharge an accused in terms of section 191, such discharge can amount only to a discontinuance of the proceedings against that accused and does not have the effect of an acquittal ;

(iv) An acquittal under section 190 means an acquittal on the merits.

In regard to contentions (i), (ii) and (iii) above, on a consideration of the numerous authorities cited to us and of the arguments of counsel, I am satisfied of their soundness for reasons which I shall now proceed to discuss.

In *Senaratna* v. *Lenohamy* (*supra*), Wood Renton, C.J., and De Sampayo, J. (with Ennis J., dissenting) held that the discharge of an accused without trial under section 191 is no bar to the institution of fresh proceedings against that accused in respect of the same charge. In that case the discharge had been made as the complainant's witnesses were absent on the day fixed for the trial and the complainant was not ready

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to go on without them. The discharge of the present appellant in case No. 14038 referred to earlier by me took place, therefore, on a ground substantially similar to that which the Divisional Bench in *Senaratna's case* held could not give rise to a successful plea of *autrefois acquit*. Although it is a decision only of the majority of the Bench constituting the Court, it has to be regarded by us as the decision of the Bench of three Judges, and, constituted as we are, we have no power to review it even if we had disagreed with it. It is right to add here, however, that on an analysis of the facts of that case and of the reasoning in the judgments of the majority and after considering subsequent cases in which reference has been made thereto I am in respectful agreement with the reasoning of the majority.

The decision in *Senaratna* v. *Lenohamy* (*supra*) appears to have been followed for over a third of a century by this Court until 1953 when Nagalingam, A.C.J., in *Don Abraham* v. *Christoffelsz* (*supra*) and *Adrian Dias* v. *Weerasingham* (*supra*) expressed views which appear to be different from those that formed the *ratio decidendi* in *Senaratna's case*. In the first of these two cases, *i.e.*, *Don Abraham's case*, Nagalingam, A.C.J.'s attention does not appear to have been drawn either to *Senaratna's case* or to two other cases where a similar view had been taken by Soertsz, J. In the second case, *i.e.*, *Adrian Dias's case*, the attention of the Court had been invited to *Senaratna's case*, but Nagalingam, A.C.J., observed that the majority of the Court there took the view that the order was one of discharge because " the facts tend to show that the prosecutor had not been given a fair opportunity of placing his evidence before Court ". This observation has been criticized by learned Crown Counsel as one not borne out by an analysis of the judgments of the two judges who formed the majority of the Court. The question before the Court in *Senaratna's case* was whether the discharge of an accused person without trial under section 191 can amount to an acquittal. It appears to me that the majority of the Court held the order there in question to be one merely of discharge because the stage at which the order was made was a " previous stage of the case " within the meaning of section 191, that is to say, the stage when all the prosecution evidence as contemplated by section 190 has been taken had not been reached. That being the *ratio decidendi* of *Senaratna's case*, it is apposite to quote the words of Lord Devlin in *Jones* v. *Director of Public Prosecutions*, (1962) A.C. 635, at 705, that " it is well established that what is binding in an authority is the *ratio decidendi* and a Court that is bound by the decision cannot escape the ratio by discovering some new factor mentioned in the judgment and using it to justify the result ". It will be seen from a perusal of *Adrian Dias's case* that, having made the observation which Crown Counsel criticized, the learned judge went on to found his own decision on the appeal before him on an *obiter dictum* of De Sampayo, J.

Gunasekara, J., in *Edwin Singho* v. *Nanayakkara* (*supra*) followed *Don Abraham's case* and *Adrian Dias's case*, and thought there was no conflict between these two decisions and that of the Court of Criminal Appeal in *R.* v. *William* (*supra*). Quite recently, in *Peter* v. *Cotelingam*, (1962) 66 N.L.R. 468, I myself agreed with this view of Gunasekara, J., that there was no such conflict. On reconsideration, however, of the judgments in *The Attorney-General* v. *Kiri Banda* and *R.* v. *William*, I am free to say that I respectfully agree with the opinion of Sansoni, J., that the view taken by Nagalingam, A.C.J., in the two cases already referred to cannot be reconciled with the decision of *R.* v. *William*. I am fortified in the view I now take by a consideration also of the two judgments of Soertsz, J., adverted to already. That learned judge in *Sumangala Thera* v. *Piyatissa Thera*, (1937) 39 N.L.R. 265, stated that: (*a*) he could not agree that it is open to a Magistrate to acquit an accused under section 190 at any stage of the proceedings and (*b*) the end of the case for the prosecution is the earliest stage at which an order of acquittal may be entered. This judgment was impliedly approved by the Court of Criminal Appeal in *R.* v. *William*. In the later case of *Fernando* v. *Rajasooriya*, (1946) 47 N.L.R. 399, where a Magistrate had discharged an accused person because the prosecuting officer had not led any evidence at the trial owing to the absence of the principal witness, the Court held that there was merely a discontinuance of the proceedings against the accused and not any adjudication upon the merits, and, therefore, the order did not amount to an acquittal.

In regard to contentions (ii) and (iii), I agree with Crown Counsel that section 191 does not confer on the Magistrate a *power* to discharge an accused but merely recognizes a *right* to discharge, a right which is inherent in the Court. As he put it, where a power to hear is given, there is an implied power to discontinue hearing. Therefore, while " at any previous stage " (section 191), *i.e.*, at a stage previous to that at which all the prosecution evidence can be said to have been

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taken, a Magistrate can discharge an accused, the earliest stage at which he can acquit is the stage when the prosecution case has ended.

It remains now only to consider contention (iv) of Crown Counsel. The Court of Criminal Appeal decision in *R.* v. *William* (*supra*) is direct authority for the proposition that in section 190 the word " acquittal " has no artificial meaning and that it means an acquittal on the merits. A similar view has been expressed by Soertsz, J., in *Fernando* v. *Rajasooriya* (*supra*), by Gratiaen, J., in *Wanigasekera* v. *Simon*, (1956) 57 N.L.R. 377, by Sansoni, J., in *The Attorney-General* v. *Kiri Banda* (*supra*) and, by way of an *obiter dictum*, by me in *The Attorney-General* v. *Piyasena*, (1962) 63 N.L.R. 489. The proposition may, therefore, be now taken as fairly well settled. There are, of course, acquittals other than on the merits that are recognized by the Code, *i.e.*, those referred to in sections 194, 195 and 290. These, to use a phrase suggested to us by Crown Counsel, may be conveniently referred to as " statutory " acquittals, the term " acquittal " being employed in those three sections in order to attract the provisions of section 330 of the Code and thereby avoid a person accused being twice vexed. In regard to the decision in *Edwin Singho* v. *Nanayakkara* (*supra*), our attention was further drawn to the circumstance that Gunasekara, J., had made an attempt to reconcile the decisions in *Don Abraham's* and *Adrian Dias's* cases only with one of the *rationes decidendi* in *R.* v. *William* (*supra*). Crown Counsel pointed out that the learned judge had not addressed his mind to the decision that an acquittal under section 190 must be made on the merits of the case. This criticism, I must add, is now available in respect of the decision in *Peter* v. *Cotelingam* (*supra*) as well. He invoked in support of his criticism the observations of Lord Simonds in *Jacobs* v. *London County Council*, (1950) A.C., at 369, that " there is no justification for regarding as *obiter dictum* a reason given by a judge for his decision because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decided two things would decide nothing ". I am of opinion that Crown Counsel's criticism is well-founded and that his contention (iv) is also sound.

In view of all that I have stated above, I am of opinion that the cases of *Don Abraham* v. *Christoffelsz* (*supra*) ; *Adrian Dias* v. *Weerasingham* (*supra*) ; *Edwin Singho* v. *Nanayakkara* (*supra*) ; and *Peter* v. *Cotelingam* (*supra*) ; have been wrongly decided and should be over ruled.

The learned Magistrate was, in my opinion, right in rejecting the plea of *autrefois acquit*. This appeal is accordingly dismissed.

SRI SKANDA RAJAH, J.
I agree.

G. P. A. SILVA, J.
I agree.

Appeal dismissed.

Present : **Basnayake, C.J., Herat, J., and Abeyesundere, J.**

KUMARIHAMY *vs.* MUDIYANSE AND OTHERS

S.C. No. 510/59 (*F.*)—*D.C. Puttalam, No.* 6041.

Argued on : October 25 and 26, 1962.
Decided on : October 26, 1962.

Kandyan Law—Marriage registered as " deega " prior to Kandyan Law Declaration and Amendment Ordinance—Subsequent acquisition of binna rights.

Held : (1) That where a marriage has taken place before the enactment of the Kandyan Law Declaration and Amendment Ordinance, the mere registration of the marriage as a *deega* marriage would not *per se* result in the forfeiture of *binna* rights subsequently acquired by a woman whose marriage is so registered.

(2) That in view of the cogent oral and documentary evidence, the plaintiff, whose marriage was registered as a *deega* marriage, can be held to have regained *binna* rights.

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Cases referred to : *Dingiri Amma* v. *Ukku Banda*, (1905) Ord. 193.
Appuhamy v. *Kiri Menike*, (1912) 16 N.L.R. 238.
Appuhamy v. *Kumarihamy*, (1922) 24 N.L.R. 109.
Punchi Menika v. *Appuhamy*, (1917) 19 N.L.R. 353.
Punchi Menika v. *Peeris Sinno*, (1912) 1 Times 148.
Appuhamy v. *Kiri Banda*, (1926) 7 Law Rec. 176 ; (1926) 4 Times 75.
Banda v. *Ungarala*, 9 Law Rec. 45.
Perera v. *Aslin Nona*, (1958) 60 N.L.R. 73
Mampitiya v. *Wegodapola*, (1922) 24 N.L.R. 129.

H. W. Jayewardene, *Q.C.*, with *D. R. P. Goonetillake* and *L. C. Seneviratne*, for the plaintiff-appellant.

G. T. Samarawickrema, with *M. Rafeek*, for the defendants-respondents.

BASNAYAKE, C.J.

The only point in dispute in this action is whether the plaintiff whose marriage is registered as a *deega* marriage is entitled to claim *binna* rights and whether the plaintiff's brother, the 1st defendant, and her sisters have by their declarations and conduct conceded those rights to her.

It is not denied that the plaintiff's marriage was registered as a *deega* marriage. The plaintiff's evidence is that though she married in *deega* she resided in the *mulgedera* with her husband who was a clerk in the Kurunegala Kachcheri. Two children were born in the *mulgedera* at Wadigamangawa—one in 1914 and the other in 1917. At the time of her marriage in 1909 her mother was dead but her father was alive. It was in 1919 that he died. During his life-time the plaintiff and her other sisters, Dingiri Amma *alias* Sittamma Kumarihamy and Hemawathie Kumarihamy, lived together in the *mulgedera*. Hemawathie died in 1938. Her child, Ran Menika, is the 3rd defendant. Dingiri Amma *alias* Sittamma Kumarihamy died in 1940 leaving a daughter, Nandawathie, the 2nd defendant. The plaintiff supported her oral testimony that she was accorded *binna* rights by her brother and sisters with documentary evidence. They are as follows :—

(*a*) The birth certificates P 1 and P 2 which show that her two children were born at Wadigamangawa where the *mulgedera* was.

(*b*) Mortgage Bond P 4 by which the plaintiff, 1st defendant, Abeysingha Rasanayaka Kiri Mudiyanse Nilame, and her sister, Hemawathie Kumarihamy, mortgaged in March, 1933, five lands called Kongahawatta, Suriyagahalanda, Katuru-muwangahawatta, Palugahahena and Navaditotamedamagahawatta in extent 5 acres 3 roods and 1 perch with the buildings and plantations thereon.

(*c*) Document P 5 dated 1st July, 1933, by which the 1st defendant in authorising D. W. Kasturi Arachchi, an assistant teacher at the Anamaduwa School, to occupy a house and land described it as " our house built on the portion of land extending from the fence of Sultan Tamby up to the fence of the land whereon Stephen, the painter, resides out of the lands belonging to us, Abeysingha Rasanayaka Dingiriamma Kumarihamy, Abeysingha Rasanayaka Kiri Mudiyanse Nilame, Muttumenika Kumarihamy and Hemawathie Kumarihamy of Wadigamangawa ".

(*d*) Document P 11 dated 26th July, 1931, whereby Dingiri Amma Kumarihamy, the 1st defendant, Kirimudiyanse Nilame, the plaintiff, Muttu Menika Kumarihamy, and her sister, Hemawathie Kumarihamy, permitted Kaluanaide Vidanage Naide to occupy and reside on the portion of land extending from the fence of the garden of Asanar Mudalaly up to the fence where Sandana resides " out of the lands situated at Anamaduwa and belonging to them ".

(*e*) Document P 12 dated 26th July, 1931, by which Dingiri Amma Kumarihamy, the 1st defendant, Kiri Mudiyanse Nilame, the plaintiff, Muttu Menika Kumarihamy, and her sister, Hemawathie Kumarihamy of Wadigamangawa, authorised Jayakody Arachchige Don Hendrick Appuhamy to reside on the portion of land between the fence of John's boutique and the fence of the boutique where Upasaka Tamby resides " of the lands belonging to them " and situated at Anamaduwa.

The tenant on P 12 Hendrick Appuhamy stated that the 1st defendant said that the land belonged to them and the others whose names were inserted in the document. Kaluanaide's evidence that it was the 1st defendant who gave the names of the other co-owners and that the document was

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written to his dictation goes a long way to strengthen the plaintiff's claim. The 1st defendant admitted in his evidence that after the marriage the plaintiff came back to the *mulgedera* and looked after her father and lived there, as his eldest sister, Dingiri Amma Kumarihamy, was a cripple and was unable to attend on her father. He also admitted that the plaintiff took the produce of the paddy fields at Helambe for quite a long time. The plaintiff's niece, Ran Menika, also admitted that fact in her evidence. Oral evidence of an interested person where it is unsupported by other evidence has to be closely scrutinised to ascertain to what extent it is coloured by self-interest ; but the evidence that has been referred to above goes to show that in this case the plaintiff's oral evidence finds support in a number of documents to which she, the 1st defendant and her sisters were parties. In the face of the oral evidence supported by documentary evidence, the learned District Judge's conclusion that the plaintiff did not regain any rights in her paternal property cannot be sustained.

In the instant case the plaintiff's marriage appears to have been a *deega* marriage only in name. She did not leave her *mulgedera*, she looked after her father till his death and enjoyed equally with her brother and sisters the paternal property. This being a marriage before the Kandyan Law Declaration and Amendment Ordinance, it is not bound by the inflexible rule laid down in section 9 of that Ordinance. In a marriage before that Ordinance the mere registration of the marriage as a *deega* marriage does not result in the forfeiture of the rights of the woman whose marriage is registered as a *deega* marriage (Marshall's Judgments, *Mampitiya* v. *Wegodapola*, (1922) 24 N.L.R. 129). There are a number of decisions of this Court,[1] in which on less cogent material a woman married in *deega* has been held to have regained *binna* rights.

The judgment of the learned District Judge is, therefore, set aside and the case sent back in order that interlocutory decree may be entered in terms of the prayer in the amended plaint.

The appellant is entitled to the costs of this appeal.

HERAT, J.
I agree.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

Present : **Tambiah, J., and Alles, J.**

R. A. JAYASINGHE & ANOTHER *vs.* S. D. RANSO NONA

S.C. 103/'62 (*Inty.*)—*D.C. Gampaha*, 6011.

Argued on : February 9, 1965.
Decided on : March 4, 1965.

Donation—" Jus Accrescendi "—Does the principle apply to deeds of gift ?

Held : (1) That it is well settled law that the principle of *jus accrescendi* does not apply to deeds of gift.

(2) That if, however, the terms of the deed clearly indicate that there should be such an accrual, then the Courts would give effect to it.

Per TAMBIAH, J.—"This rule was evolved in deference to the principle of Roman Law that a person cannot die partly testate and partly intestate. Although this rule was applicable only among co-legatees, Justinian extended it to cover donations *mortis causa*. The Roman-Dutch writers applied this doctrine only to testamentary gifts and *donatio mortis causa* and did not apply it to gifts *inter vivos*, which were considered to be in the nature of contracts. But if the words of

1. (a) *Dingiri Amma* v. *Ukku Banda*, (1905) Ord. 193
(b) *Appuhamy* v. *Kiri Menike*, (1912) 16 N.L.R. 238
(c) *Appuhamy* v. *Kumarihamy*, 24 N.L.R. 109
(d) *Punchi Menika* v. *Appuhamy*, (1917) 19 N.L.R. 353
(e) *Punchi Menika* v. *Peeris Sinno*, (1912) 1 Times 148
(f) *Appuhamy*, v. *Kiri Banda*, (1926) 7 Law Recorder 176 ; 4 Times 75
(g) *Banda* v. *Ungarala*, 9 Law Recorder 45
(h) *Perera* v. *Aslin Nona*, 60 N.L.R. 73 at 75-76

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a deed expressly state that there should be such accrual, then effect should be given to the provisions of the deed and the right of accrual should be recognised. In such cases the words should be clear before one could say that there is a right of accrual but the doctrine of *jus accrescendi* with the various presumptions attached to it have no application."

Authorities cited : Voet, 39.5.14 ; 7.2.9.
Van Leeuwen's Roman-Dutch Law—Kotze (2nd Ed.), p. 232.
Perez, 6.51.9.
Burge, Vol. 2, p. 144.
Maasdorp, Vol. 3 (4th Ed.), p. 109.
Nathan, Vol. 2, sec. 1087.

Cases referred to : *Carlinahamy* v. *Juanis*, (1924) 26 N.L.R. 146.
Fernando v. *Fernando*, (1924) 27 N.L.R. 321.
Ibrahim v. *Alagammah*, (1951) 53 N.L.R. 302 ; XLV C.L.W. 35
Nagalingam v. *Thanabalasingham*, (1952) 54 N.L.R. 121 ; XLVIII C.L.W. 1
Upasakappu v. *Dias*, (1939) 41 N.L.R. 91.

H. W. Jayawardena, Q.C., with *E. S. Amarasinghe, W. D. Gunasekera* and *I. S. de Silva*, for the 15th defendant-appellant.

S. Sharvananda, for the plaintiff-respondent.

TAMBIAH, J.

The plaintiff instituted this action for the partition of a land called Delgahawatta, depicted as Lots A to M in Plan X filed of record. It is common ground that one Samel, the original owner of this land, gifted this property to his sons, Hendrick, Paulis, Welun and Singhappu and Jamis, by deed of gift, No. 9046 of 31st May, 1886, marked P 1. Welun and Singhappu died issueless and intestate. Jamis, the 25th defendant, who adopted Amaradasa, the 15th defendant, as his child, by deed of gift, No. 12926 of 1950 marked 15 D 1, transferred his interest to the 15th defendant.

It is the plaintiff's case that the deed of gift P 1 created a *fideicommissum* and by the doctrine of *jus accrescendi*, the share of Jamis lapsed and Hendrick and Paulis got title to the whole land and their interests.

The 15th defendant also led evidence to show that by an amicable partition, in lieu of his 1/3rd share of the land, Jamis and he possessed Lot " G " in the said plan. The learned District Judge has held that the deed P 1 created one joint *fidei commissum*, and applying the principle of *jus accrescendi* Jamis's share lapsed and Hendrick and Paulis became entitled to the whole land. On this footing he has given shares to the other defendants.

Counsel for the appellant contends that the deed P 1 does not create a *fidei commissum* and in the alternative the principle of *jus accrescendi* does not apply to deeds of gifts and consequently, the title to 1/3rd share to which Jamis was entitled to, passed by deed of transfer 15 D 1 of 1950, to the 15th defendant. The counsel for the appellant did not press the point that Jamis and the 15th defendant exclusively possessed lot " G " in lieu of 1/3rd share of this land. It is sufficient to consider the short point whether the principle of *jus accrescendi* applies to the deed of gift P 1 of 1886.

The relevant portion of P 1 is as follows :—

" Wherefore we the said Donors have hereby gifted, donated, conveyed and set over under the said Donees all our rights, title and interest to the said premises to be held and possessed by them in any manner they like and during their life-time and the said five donees shall not alienate the said premises in any manner whatsoever ; and after their deaths their lawful children and grandchildren shall do anything they like with the said premises."

P 1 is a certified copy issued by the Registrar-General. It is significant that in P 1 there are many omissions probably due to some of the words in the original being illegible. It was contended that the plaintiff who relied on this deed should place before Court the full terms of the deed and cannot rely on a copy with omissions which are material. Be that as it may, assuming that the omitted words were immaterial, the question arises whether the principle of *jus accrescendi* could be applied to deeds of gift.

The *jus accrescendi* was a rule of Roman Law which was applied among co-owners in testa-

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mentary succession or among legatees by which if one of them cannot or will not take his portion it accrued to the co-legatees to the exclusion of the heirs *ab intestato*.

This rule was evolved in deference to the principle of Roman Law that a person cannot die partly testate and partly intestate. Although this rule was applicable only among co-legatees, Justinian extended it to cover donations *mortis causa*. The Roman-Dutch writers applied this doctrine only to testamentary gifts and *donatio mortis causa* and did not apply it to gifts *inter vivos*, which were considered to be in the nature of contracts. But if the words of a deed expressly state that there should be such accrual, then effect should be given to the provisions of the deed and the right of accrual should be recognised. In such cases the words should be clear before one could say that there is a right of accrual but the doctrine of *jus accrescendi* with the various presumptions attached to it have no application.

Voet, one of the greatest of the Roman-Dutch writers, states as follows : (*vide* Voet, XXXIX.5.14 of Gane's Translation, Vol. VI, p. 101) :

> " If a single thing or if all goods are donated to more persons than one at the same time, and one of them does not accept what is donated, his share by no means accrues to the rest. Nay rather does it stay outside the cause of donation. That is because such a donee is neither an heir, nor a legatee nor in the place of a legatee ; nor do we read anywhere that the right of accrual has been adopted in contracts or other acts *inter vivos*. Nay it is clearly found that the right of accrual was extended by Justinian in the passage cited below only to a donation *mortis causa* which is almost everything put on the same footing as legacies."

In applying the rule of *jus accrescendi*, the Roman-Dutch writers took the view that such a rule was in accordance with the wish of the testator and his affection for the legatees (*vide* Voet, VII.2.9). Dekker in his notes to Chapter 30 of Van Leeuwen's Commentaries on Roman-Dutch Law, which deals with donations and gifts, sets out the differences between donation *inter vivos* and donation *mortis causa*, as follows (*vide* Van Leeuwen's Roman-Dutch Law by Kotze, 2nd Edition, page 232) :

> " Whence it follows *per se* that the *jus accrescendi* and the *lex alcidia* must likewise be observed as regards donation *mortis causa*."

Perez is also of the same opinion (*vide* Perez, VI.51.9). Both writers apply the principle of *jus accrescendi* only in connection with wills and by extension to *donatio mortis causa*. The modern writers on Roman-Dutch Law also adopt the same view (*vide* Burge, Vol. II, p. 144 ; Maasdorp, Vol. III, 4th Edition, p. 109 ; Nathan, Vol. II, section 1087). Nathan emphatically states that the right of accrual, *jus accrescendi* does not apply where several persons are donees.

Jayawardena, A.J., in a very exhaustive judgment, has shown beyond all doubt that the Roman-Dutch writers did not apply the principle of *jus accrescendi* to deeds of gift (*vide* the dissenting judgment of Jayawardena, A.J., in *Carlinahamy* v. *Juanis*, (1924) 26 N.L.R. 146. In the same case Bertram, C.J., observed as follows : (*vide ibid*, at 141).

> " I agree that it must be taken that the *jus accrescendi* in the proper sense of the term does not apply in instruments *inter vivos*, that is to say, that in the case of an instrument *inter vivos*, the law will not presume merely from the conjunction of two or more persons in the same liberality, that, in the event of one of these predeceasing the vesting of the liberality, his share was intended to accrue to the others. In the case of such an instrument, such a result can only arise from operative words, which either expressly or by implication have this effect."

In the case cited above, the majority view proceeded on the footing that by construing the terms of the deed which was before the Court, the right of accrual was intended. However, the headnote erroneously states that the principle of *jus accrescendi* is not confined to testamentary *fideicommissum* but it applies equally to *fideicommissum* created by deed *inter vivos*.

In *Fernando* v. *Fernando*, (1924) 27 N.L.R. 321, it was held that the principle of *jus accrescendi* does not apply to *fideicommissary* deeds of gift. In dealing with this aspect, Bertram, C.J., emphatically stated as follows (*vide ibid.*, at 322) :

> " In the second place, I think it must now be taken as settled that the *jus accrescendi* does not apply in the case of *fideicommissary* deeds of gift. We have, therefore, to interpret the deed of gift, without the aid of this legal presumption."

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This principle has been adopted in subsequent cases (*vide Ibrahim* v. *Alagammah*, (1951) 53 N.L.R. 302).

The Counsel for the respondent relied on the ruling of the Privy Council in *Nagalingam* v. *Thanabalasingham*, (1952) 54 N.L.R. 121, for the proposition that the rule of *jus accrescendi* applies to deeds of gift as well. In that case the main question for decision was whether acceptance of a deed of gift on behalf of a minor by his maternal uncle, without appointment by lawful authority, was valid or invalid. Sir Lionel Leach, who delivered the opinion of the Board, in dealing with this question, did not express the view that the principle of *jus accrescendi* applies to deeds of gift as well. The works of the Roman-Dutch writers on this matter were neither cited nor considered by the Privy Council in dealing with this aspect of the case. In interpreting the deed the Board took the view that one *fideicommissum* was created and not several *fideicommissa*. In construing the deed of gift it was held by Their Lordships that " the gift . . . is not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship ".

The Counsel for the respondent also cited *Upasakappu* v. *Dias*, (1939) 41 N.L.R. 91, for the proposition that the principle of *jus accrescendi* applies to deeds of gift. In that case Soertsz, J., referring to the doctrine of *jus accrescendi* stated as follows :

> " When this question again arose in our Courts twenty years later in connection with a *fideicommissum* created by a deed *inter vivos*, Bertram, C.J., declared that he reserved his opinion " whether so far as relates to the *jus accrescendi*—that is how he expressed himself—there is any substantial difference between testamentary *fideicommissa* and *fideicommissa* constituted by instrument *inter vivos* ' and Shaw, J., who sat with him said, ' In *Carry* v. *Carry*, 2 N.L.R. 313, and *Ayamperumal* v. *Meeyan*, 4 C.W.R. 182, this Court held the *jus accrescendi* to apply to cases of *fideicommissa* constituted by gifts *inter vivos* on the ground that the language used by the donor showed an intention to that effect. I was a party to the latter decision and expressed a doubt whether a similar rule of construction applied in the case of donation *inter vivos* as applied in the case of a will ; but I did not, and do not now, doubt that a right of accrual may exist in either case, when the language of the donor or testator expresses such an intention '. I should prefer not to express myself quite in that manner. It is not really a question of the *jus accrescendi* applying in these cases, but a similar result being achieved by an express declaration on the part of the testator or donor, or by an intention clearly to be inferred, that he desired the property to devolve in that manner. The *jus accrescendi* was a rule of the Roman law by which among co-heirs in testamentary succession or among co-legatees there is a right of accretion, so that if one of them cannot or will not take his portion, it falls to other heirs to the exclusion of heirs at law. This rule was evolved in deference to the Roman horror of dying partly testate and partly intestate, but the Roman-Dutch Law adopted that rule to the extent of saying that in no case had it automatic operation, but it would be accepted or rejected as would best give effect to the testator's intention."

It was not decided in that case that the doctrine of *jus accrescendi* applies to deeds of gift. But, as Soertsz, J., observed, if the terms of a deed clearly indicate that there should be a right of accrual, then effect would be given to it.

In view of the clear enunciation that the principle of *jus accrescendi* does not apply to deeds of gift both by the Roman-Dutch authorities and by our Courts, it is settled law that such a principle with its presumptions cannot be applied to deeds of gift. But, if by the term *jus accrescendi* is loosely meant the right of accrual, and the terms of a deed clearly indicate that there should be such an accrual, then Courts would give effect to it. But in doing so they do not apply the principle of *jus accrescendi* with its presumptions but are merely construing the terms of the deed.

Therefore, I hold that the principle of *jus accrescendi* does not apply to the deed of gift P 1. On a consideration of the express terms of deed P 1, there is nothing to indicate that if one of the sons of Samel dies issueless and intestate, his share should accrue to his other brothers. The intention to benefit the grandchildren excludes such a view. For these reasons, Jamis's share did not accrue to Hendrick and Paulis and his interest passed on deed 15 D 1 to the 15th defendant. In view of this conclusion, it is not necessary to decide whether the deed created a *fideicommissum* or not. Therefore, the 15th defendant has title to 1/3rd share of the land which

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is the subject-matter of this partition action. I set aside the order of the learned District Judge and send the case back with the direction to allot 1/3rd share of the land which is the subject-matter of this action to the 15th defendant and to allot the remaining 2/3rd according to the persons in the plaintiff's pedigree whose titles were proved.

The appellant is entitled to costs of appeal and the costs of contest in the District Court.

ALLES, J.

I agree.

Appeal allowed.

Present : **Sirimane, J., and Manicavasagar, J.**

FONSEKA *vs.* FONSEKA AND OTHERS

S.C. 240—*D.C. Panadura,* 394 *T.*

Argued on : 9th November, 1964, and 10th November, 1964.
Decided on : 25th November, 1964.

Executors and administrators—Money to be brought in to the credit of two minors in a testamentary case—Payment of this money by administrator to his Proctor for deposit in the case—Cheque payable to Proctor—Money misappropriated by Proctor—Whether estate of deceased administrator liable to refund the said sum of money to the minors—Should cheque have been drawn in Proctor's favour —Trusts Ordinance, (*Cap.* 87), *section* 15.

Minors—Gift of two properties to minors—Income therefrom—Can it be utilised to pay premia on insurance policies which would benefit minors ?

The appellant was the executor of the estate of one C. F. Fonseka and the 1st respondent was the widow of the deceased. Two properties had been gifted by the deceased to the 2nd and 3rd respondents (his minor children by a former marriage) and the first question that arose was whether the rents from these, which rents admittedly came into the deceased's hands should be paid to them out of the estate. These sums had undoubtedly not been placed to the credit of the minors by the deceased, but it was submitted that he had utilised these sums to pay the premia on two insurance policies which would benefit them.

Held : (1) That the insurance policies and the rents from the properties were two separate and distinct benefits which the minors were entitled to claim. Even if the deceased had paid the premia on the policies out of the rent he would still not be absolved from the duty of holding the rent for the minors.

When the deceased's first wife died he had had in his hands a sum of money due from her to their two minor children (2nd and 3rd respondents). Her estate was administered in D.C. Colombo, Case No. 13410/T and the deceased was the administrator. This sum had not been brought in to the credit of the minors in the testamentary case and the appellant (the deceased's executor in the present case) had paid it out of the estate.

It appeared that the deceased had made out a cheque for this sum payable to his proctor and handed it to him. The latter had misappropriated it. It was submitted on behalf of the 1st respondent that the deceased's estate was not liable and that his liability had ceased when he handed over the money to his proctor in that case. It was conceded that as far as this money was concerned the deceased was in the position of a trustee.

It was also pointed out on behalf of the 1st respondent that the money had been handed over to the person who was the deceased's proctor in that testamentary case and that payments into Court could only be made through the proctor on record, according to the rules relating to payments into Court.

Held : (2) That in adopting the course of drawing the cheque in favour of his proctor, the deceased took an unnecessary risk which placed the minors in peril. Inasmuch as the deceased had been a person with some experience in business affairs, he knew or ought to have known where this money which belonged to the minors had to be sent and that it had to be credited to the Government Agent. In these circumstances it was impossible to say as was said in the case of *Speight* v. *Gaunt*, that there was " a moral necessity or sufficient practical reason " for drawing up the cheque in the proctor's favour.

(3) That, therefore, the Executor (appellant) had rightly paid this sum out of the deceased's estate.

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Discussed : *Speight* v. *Gaunt*, (1884) 9 A.C. 1 ; 50 L.T. 330 ; 53 L.J. Ch. 419.

Distinguished : *Oriental Commercial Bank* v. *Savin*, (1873) L.R. 16 Equity 203 ; 28 L.T. 658.

H. V. Perera, Q.C., with *C. Q. Perera* and *D.C. Amerasinghe*, for the petitioner-appellant.

C. G. Weeramantry with *N. S. A. Goonetilleke* and *C. A. Amerasinghe*, for the 1st, 5th, 6th and 7th respondents.

SIRIMANE, J.

The appellant is the executor of the estate of one C. E. Fonseka. At a Judicial settlement of accounts of the estate the 1st respondent (who is the widow of the deceased) objected to five items appearing in the accounts filed. They are :—

(1) A sum of Rs. 18,343.42 which had been charged to the estate, as the deceased had failed to deposit this sum to the credit of D.C., Colombo, 13410 T.

(2) A sum of Rs. 3,109/- alleged to be due to the 4th respondent.

(3) A sum of Rs. 1,127.50 alleged to be payable to the 2nd respondent.

(4) A sum of Rs. 4,470/- alleged to be payable to the 3rd respondent.

(5) A sum of Rs. 6,150/- alleged to be due from the 1st respondent to the estate.

The learned District Judge held against the appellant in respect of all five items, and this appeal is from that order.

The appeal was not pressed in regard to items 2 and 5 set out above, and I see no reason to disturb the findings of the learned District Judge on those two items.

It is convenient to deal first with items 3 and 4.

The deceased had gifted two properties to the 2nd and 3rd respondents who are his minor children by a former marriage.

The two sums referred to in these items represent the rent from those properties which admittedly came into the hands of the deceased and which he had not placed to the credit of the minors.

It was argued for the 1st respondent that the deceased had taken out two insurance policies which would benefit the 2nd and 3rd respondents and that he utilised the rent from these properties to pay the premia on those policies.

In my view the insurance policies and the income from the properties were two separate and distinct benefits which the minors are entitled to claim.

Even if one assumes that the deceased paid the premia on the policies out of the rent, he would still not be absolved from the liability of holding the rent for the minors. The learned District Judge had found on the facts, that the deceased had *not* utilised the rent to pay the premia but that he had appropriated the rents himself ; and then proceeded to hold that the minors were not entitled to those rents. I think he was clearly in error in reaching this conclusion. Our attention was drawn to a record kept by the deceased (which counsel called a "log book") in which he had expressed the desire that after his death the 2nd respondent should utilise the rents due to him to keep alive the policy which benefits him ; but that is a matter which hardly affects the question of the deceased's liability for the rents received by him during his life-time.

The appeal in respect of items 3 and 4 must succeed and I hold that the two sums, mentioned in those items are due to the 2nd and 3rd respondents.

The main dispute is in respect of item No. 1. When the deceased's first wife died he had in his hands a sum of Rs. 18,343.42 due to his children the 2nd and 3rd respondents from their mother. Her estate was administered in the District Court of Colombo, case No. 13410 T in which the deceased was the administrator.

The deceased had failed to bring this sum into the testamentary case to the credit of the minors. The appellant has since paid this sum from the estate.

It is contended for the 1st respondent that the liability of the deceased had ceased as he had

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handed over the money to his proctor in that case, (one C. M. G. de Saram) who had apparently misappropriated this sum. It is not quite clear as to how and when the deceased paid the money to his proctor, but the argument proceeded on the footing that he had made out a cheque payable to the proctor.

It is conceded that the deceased was in the position of a trustee where this money is concerned.

Under section 15 of the Trusts Ordinance (chapter 87) a trustee is bound to deal with trust property as carefully as a man of ordinary prudence would deal with his own property.

The deceased had in his hands money belonging to minors he was required to deposit this money in Court. It is well known that monies which have to be brought to Court are paid to the Kachcheri, the head of which is the Government Agent of the province. When payments are made by cheque such cheques are usually made payable to the Government Agent. If the deceased had followed this course the money would have been effectively brought into Court and no one could have misappropriated it. But he had made the cheque payable to the proctor personally.

A person who holds in his hands money belonging to minors should, I think, adopt the safest course in dealing with that money.

On behalf of the 1st respondent it was pointed out that de Saram was the deceased's proctor in the testamentary case, and that payments into Court could only be made through the proctor on record according to rules relating to payments into Court. (*See* payment into Court order, 1939).

Payments into Court are made on a deposit-note obtained from Court. It is the proctor (if there is one on record) who has to apply to Court for such a note. But it is the client who provides the money ; and when a fairly large sum has to be deposited as in the present case the usual practice is to draw up a cheque in favour of the Government Agent. The proctor is merely an agent through whom the money is transmitted. In this instance there were two courses open to the deceased ; either to draw the cheque in favour of the proctor, or in favour of the Government Agent. In adopting the former course he took an unnecessary risk, which placed the minors in peril.

In the case of *Speight* v. *Gaunt*, ((1884) 9 Appeal Cases, page 1), a trustee employed a broker for purchasing securities authorised by the trust, and paid the purchase money to the broker. The broker gave the trustee a bought-note on the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never purchased the securities but appropriated the money to his own use, and later became insolvent. The form of the bought-note would have suggested to some experts that the loans were to be direct to the Corporations, but there was nothing in them to excite suspicion in the mind of an ordinary prudent man.

One has to bear in mind that a broker does not as a rule disclose his principal. In the circumstances of that case it was held that the trustee was not liable as he had followed the usual course of business in purchases on the London Exchange.

But the Earl of Selbourne pointed out that if the broker had represented to the trustee that the contracts were with the Corporation for loans direct to them from the trustees, he would not have been justified in paying the money to the broker, for in such a case there would have been no moral necessity or sufficient practical reason for doing so. In this instance the deceased had with him money belonging to minors. He knew where that money had to be sent and to whose credit it had to be placed. If he did not, (which I find it difficult to believe) he could quite easily have apprised himself of these facts. There is some evidence which shows he was an Engineer and a person with some experience in business affairs.

In these circumstances it is impossible to say that there was " a moral necessity or sufficient practical reason " for drawing up the cheque in favour of the proctor.

The facts in the case of the *Oriental Commercial Bank* v. *Savin*, (1873) 16 Equity Cases, page 203), relied on by counsel for the 1st respondent are, in my view, somewhat different from those in the present case and can be distinguished. There, one of three executors employed a Solicitor (who had been employed by the testatrix in her life-time on various matters, who had drawn up her Will, and who was also employed for proving the

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Will) to negotiate for the compromise of a debt due from the estate. The money paid for this purpose was misappropriated by him.

The Court held that the Executor had "done just what any prudent man would think himself safe in doing". There was no question in that case in dealing with money belonging to minors, or the prudent course to be followed when called upon to bring such money into Court.

I am of the view that the Executor was right in charging the amount due to the 2nd and 3rd respondents from the deceased to the estate.

The order of the learned District Judge in respect of items 1, 2 and 4 is varied as set out above. I think it also fair that the executor should be paid the costs of this litigation both here and below out of the estate.

MANICAVASAGAR, J.

I have had the advantage of reading the judgment of my brother, Sirimane, J., and I agree with the conclusions he has reached in regard to items 1, 3 and 4 which are numbered items 66, 71 and 72, respectively, in the accounts filed by the executor-appellant.

I desire, however, to add a few words on the question of the liability of the deceased-administrator, Fonseka, towards his children, the 2nd and 3rd respondents, in regard to item 66.

Fonseka was the administrator of his wife's estate in Testamentary suit 13410 of the District Court of Colombo ; the 2nd and 3rd respondents who are minors were entitled as intestate heirs of their mother to Rs. 18,343.42. The District Judge had ordered that this money should be brought by the administrator to the credit of the Testamentary action, and directed that a Deposit-note should issue to enable this to be done : the money was not so brought, though Fonseka had issued a cheque for the amount in favour of de Saram, his proctor in the testamentary action ; de Saram had misappropriated the money ; Fonseka is dead, and his executor, the appellant, had debited Fonseka's estate with the account.

Is Fonseka's estate liable to pay this money to the two respondents? Fonseka as administrator held a position of trust ; our law demands that a trustee should in dealing with trust property exercise the care of a man of ordinary prudence. The question which arises for determination is whether Fonseka fell short of this standard. I think he did ; because, he could have, and should have as a prudent man made the cheque out in favour of the Government Agent with whom the money is deposited in the Kachcheri. It was submitted that de Saram was at the time a proctor of good repute, and it was not unusual to do what Fonseka did, and, therefore, he cannot be held liable.

A trustee is entitled to select a proctor to perform professional duties, which he (the trustee) is not competent to do ; as long as he selects a person properly qualified he cannot be made responsible for his intelligence or for his honesty in regard to acts within the ambit of his duties as a professional man ; but he ought not to entrust him with tasks which fall outside his professional duties, though the proctor may be willing to undertake it ; it was no part of de Saram's professional duty to deposit the money at the Kachcheri, and even if he was willing to undertake it, Fonseka should not have made out his cheque in de Saram's favour because there was an element of risk, the possibility of misappropriation by the proctor. When two courses of action are open to the trustee, one fraught with risk, and the other not, ordinary prudence must dictate to him the latter course of action ; he cannot be heard to say "I trusted my proctor but he has cheated me". A man of ordinary prudence will not incur an unnecessary risk ; that is to say, a risk which the law does not compel him to take or in the words of the Earl of Selbourne, L.C., 9 A.C., 1884, page 1, for which there is "No moral necessity or sufficient practical reason, from the usage of mankind or otherwise" if he does take that risk and incurs loss thereby, the loss must fall on him and not on the innocent party. Fonseka did take an unnecessary risk, and his estate must bear the loss.

I also agree that the cost of this enquiry here and in the original Court should be borne by the estate.

Appeal allowed.

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Present : **Sri Skanda Rajah, J.**

QUEEN *vs.* S. S. WIMALADHARMA*

Revision in M.C. Kegalla, 38289—*APN/GEN/*10/65.

Decided on : 12th February, 1965.

Criminal Procedure Code, section 328, *read with section* 4 *of the Ceylon* (*Constitution*) *Order-in-Council,* (*Cap.* 379), *and section* 10 *of the Letters Patent,* (*Cap.* 388).

His Excellency the Governor-General's powers to quash a conviction—Effect of a Free Pardon.

Magistrate's right to quash a conviction.

The accused-petitioner, after the dismissal of an appeal by him from a conviction and sentence of a fine, made representations to His Excellency the Governor-General and received a reply stating that "the sentence imposed on him has been set aside". Not being content with this, he further petitioned His Excellency to which he received a reply to the effect that not only the sentence, but also his conviction was quashed by His Excellency.

The accused's proctor filed a motion and petition from the accused and moved that theconviction be set aside by the Magistrate, who referred the case to the Supreme Court for a direction as to how he should act in the matter.

Held : (1) That the Magistrate was right in sending the matter to the Supreme Court, but he would have been perfectly right if he refused the application, for he cannot quash a conviction entered by him, much less, when affirmed by the Supreme Court.

(2) That quashing a conviction involves an exercise of judicial power and His Excellency could not exercise such judicial powers ; but the undisputed right of His Excellency to grant a Free Pardon has the effect of wiping out the conviction also.

Cases referred to : *R. v. Guest Exparte Attorney* (1964) 3 A.E.R. 385
Agnes Nona 53 N.L.R. 106

1st accused-petitioner, S. S. Wimaladharma, present in person, on notice.

Ranjit Dheeraratne, Crown Counsel, for the Attorney-General, as *amicus curiae.*

SRI SKANDA RAJAH, J.

This matter comes up before this Court in this way : This accused who is a teacher in a Government school, was convicted of voluntarily causing hurt with a sword and fined only Rs. 100/-. Thereupon he appealed to this Court, and the appeal was dismissed on 26th June, 1963, after it was argued by one of our most eminent Queen's Counsel.

Thereafter the accused made representation to His Excellency the Governor-General. In reply he received a letter dated 7th November, 1963, stating that " *the sentence imposed on him has been set aside* ". Not being satisfied with that the accused further petitioned His Excellency the Governor-General on the 20th of July, 1964, to which he received a reply dated 5th August, 1964, which refers to the earlier letter of 7th November, 1963. This Court is informed by the Interpreter of this Court in Sinhala, as well as by the Crown Counsel, who is proficient in Sinhala, that the Sinhala letter of 5th August, 1964, had been correctly translated on the reverse. The English translation runs as follows : " With reference to his petition dated 20th July, 1964, Mr. S. S. Wimaladharma of Meneripitiya, Warakapola, is informed that not only the sentence imposed on him but also his conviction, too, in the above-noted case was quashed by His Excellency the Governor-General's order which was conveyed to him by letter No. M/J-R. 148/63 of 7th November, 1963. By His Excellency's Command ".

The question arises whether a conviction can be quashed by His Excellency the Governor-General. Quashing a conviction involves the exercise of judicial power. Judicial power is exclusively vested by the Ceylon (Constitution) Order-in-Council in the Supreme Court and other Courts and tribunals to which the Judicial Service Com-

* For Sinhala translation, see Sinhala section, Vol. 10 part 1, p 1.

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mission alone makes appointments. Judicial power cannot lawfully be exercised by the executive.

This Court is not unaware that section 328 of the Criminal Procedure Code, read with section 4 of the Ceylon (Constitution) Order-in-Council, Chapter 379, and section 10 of the Letters Patent, Chapter 388, empowers His Excellency the Governor-General to grant a Free Pardon. Nobody can dispute that right. Free Pardon would have *the effect* of wiping out the conviction also.

It may be useful to quote from the book, *Home Office*, by Sir Frank Newsam, at page 114 : "A Free Pardon wipes out not only the sentence or penalty, but the conviction and all its consequences, and from the time it is granted leaves the person pardoned in exactly the same position as if he had never been convicted ".

Section 328 (2) of the Criminal Procedure Code provides that before making an order under that section (for the remission or suspension of a sentence) " the Governor-General *may* require the Presiding Judge or the Magistrate of the Court by which the conviction was ordered to state his opinion as to whether the application should be granted or refused and to give his reasons for such opinion ".

Home Office (*Supra*), at page 121, says, " Cases in which it comes to light, after the conviction and after appeal rights have been exhausted, that *there has been miscarriage of justice are infrequent*. The Home Secretary, before recommending a Free Pardon or Remission in such circumstances, *always consults the Judge or Magistrates who tried the case or heard the appeal* ".

The letter dated 5th of August, 1964, was produced before the Magistrate by the accused's proctor, who filed a motion and petition from the accused and moved that the conviction be set aside by the magistrate. The magistrate was in doubt as to whether he had jurisdiction to deal with such an application and sent the case to this Court asking for a direction as to how he should act in this matter. It was, thereafter, that the accused was noticed and these proceedings taken.

The magistrate, being in doubt, was right in sending it to this Court ; but, he would have been perfectly right to refuse the application made by the accused through his proctor. A magistrate cannot quash a conviction entered by him. He would be *functus officio* in regard to the conviction, *R.* v. *Guest, ex-parte Anthony*, (1964) 3 A.E.R. 385. It, therefore, follows that he cannot quash a conviction affirmed by this Court. This application was misconceived. It is refused.

In *Agnes Nona*, 53 N.L.R. 106, a lawful order made by His Excellency the Governor-General was sought by the Permanent Secretary to the Minister of Justice to be enforced unlawfully. But, in this case, there has apparently been a mistake either on the part of His Excellency the Governor-General's office or His Excellency's advisers as to the reply to be sent to this accused's letter of 20th July, 1964, which asked for a clarification of the letter of 7th November, 1963. The letter written to the accused on 7th November, 1963, did not indicate the grant of a Free Pardon to the accused. It only set aside the sentence, *i.e.*, remitted the fine, but did not purport to quash the conviction. Therefore, the statement in the letter of 5th August, 1964, that the conviction was also quashed is incorrect.

The following order was also later delivered by Sri Skanda Rajah, J. in connection with the same matter:—

Supreme Court (*on circuit*), *Jaffna.*

To be appended to the order of : 12th February, 1965.

Date : 19th February, 1965.

Courts Ordinance, Section 36—Is it imperative that appeals and applications to the Supreme Court should be heard at Colombo only ?

Held : That Section 36 of the Courts Ordinance does not make it imperative that every appeal or application to the Supreme Court should be dealt with at Colombo.

V. S. A. Pullenayagam, Crown Counsel, with *Ranjith Dheeraratne, Crown Counsel*, in support,

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SRI SKANDA RAJAH, J.

This matter came up before me at Colombo on the 12th February, 1965, and I made my order on that date. It is mentioned today by Mr. Pullenayagam, Crown Counsel, when I am on Circuit in Jaffna sitting in Assize.

Section 36 of the Courts Ordinance provides that the appellate jurisdiction of the Supreme Court shall be *ordinarily* exercised only at Colombo. I am of the view that the use of the word "*ordinarily*" implies that it is not imperative that every appeal or application should be dealt with only at Colombo. For example, the proviso to section 343 of the Criminal Procedure Code empowers a Judge of the Supreme Court sitting in Assize on Circuit to direct that any appeal from any of the Magistrates' Courts in that circuit be dealt with by him on circuit and it shall be dealt with accordingly.

This application is made under *extraordinary* circumstances in that certain facts which were not brought to the notice of this Court then are now brought to its notice. Therefore, I think it right that I should deal with this matter at Jaffna itself. The matter may be unduly delayed if I order that this be heard by me only at Colombo. Therefore, I deal with this matter here and now.

It is now brought to my notice that the advice given by the Honourable the Minister of Justice to His Excellency the Governor-General was that a "Free Pardon" may be given to the accused Wimaladharma. This advice was given in English and accepted by His Excellency the Governor-General ; but, the letter of 7th November, 1963, in Sinhala was couched in language more appropriate to an order under section 328 indicating that the punishment had been remitted. As indicated in my order of 12th February, 1965, His Excellency the Governor-General has the right to grant a Free Pardon. Nobody can dispute that right.

It appears to me that the Glossary of Legal Terms in Sinhala prepared by the Official Language Department and referred to in the course of the argument now is inadequate to express the English phrase "Free Pardon". It is found that only the word "pardon" is included in the glossary and the Sinhala equivalent used is "Samawa".

The letter of 7th November, 1963, did not contain an English translation.

Then when the accused Wimaladharma wrote to His Excellency the Governor-General again on the 20th of July, 1964, for clarification of the letter of 7th November, 1963, it was referred to the Honourable the Minister of Justice, who thereupon advised that "His Excellency the Governor-General has granted a Free Pardon, in this case in which he was convicted and fined. The Honourable Minister advises His Excellency to inform the petitioner that by the said order of His Excellency not only the penalty imposed on the petitioner but *even the conviction gets wiped out*". It is on this advice that the letter of 5th August, 1964, was written by His Excellency the Governor-General's office to the accused. Therein the word "quashed" was used and it was this word that was the subject of decision on 12th February, 1965.

It now appears that the letter was couched in rather inappropriate terms due to the inadequacy of legal terminology coined in Sinhala and that it was not intended by His Excellency the Governor-General to exercise judicial power. In truth and in fact, a Free Pardon had been granted. However, the two letters intended to convey the Free Pardon were couched in language quite inappropriate and thoroughly inadequate for that purpose. Though a Free Pardon has the effect of wiping out a conviction the use of the phrase "conviction was quashed" does seem inappropriate. I do not think that even His Excellency's office is to blame, because the vocabulary at their disposal was inadequate. All this could have been avoided if the English phrase "Free Pardon" had been used in the letter of 7th November, 1963, or, at least, in that of 5th August, 1964, instead of an inappropriate translation of that phrase.

This matter has brought to light forcefully the difficulty and danger of introducing Sinhala into the Courts where vast legal terminology is in constant use.

The application made by the accused to the Magistrate to have his conviction quashed stands refused for the reason already indicated in the earlier order.

This order will be appended to that made on 12th February, 1965.

Application refused.

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Privy Council Appeal, No. 46 *of* 1963.

Present : **Lord Reid, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Donovan and Lord Pearson.**

ABDUL KHALID ABDUL MOOMIN KHAN

vs.

MAHANTI MULLA GAMAGE ARIYADASA

From

THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 27TH APRIL, 1965.

Criminal Procedure Code, sections 178, 180, 181 *and* 184*—Charges of being members of an unlawful assembly and of committing offences in prosecution of its common object—Offences under sections* 140, 434 *read with section* 146, *sections* 144, 314 *read with section* 146 *of the Penal Code.*

Additional charges at the same trial against the same accused under sections 434, 314, 333 *and* 315 *of the Penal Code for offences alleged to be committed in the course of the same transaction as set out in the charges based on said unlawful assembly—Is there a misjoinder of charges ?—Can charges based on the existence of an unlawful assembly be joined with charges framed relying on section* 32 *of the Penal Code ?*

Six accused persons were charged with being members of an unlawful assembly the common objects of which were to commit house-trespass and to cause hurt, an offence punishable under section 140 of the Penal Code. Further, they were charged with committing house-trespass, rioting by using violence and force by assaulting, and causing hurt, as members of the said unlawful assembly, offences punishable under section 434 read with section 146 of the Penal Code, section 144 of the Penal Code and section 314 read with section 146 of the Penal Code, respectively.

In addition to the above, relying on section 32 of the Penal Code, the same accused persons were charged at the same trial with offences under sections 434, 333, 314 and 315 of the Penal Code all alleged to have been committed in the course of the same transaction set out in the above charges based on an unlawful assembly.

Five of the accused were convicted and on an appeal to the Supreme Court, where the only material point argued on behalf of the appellants was that there had been a misjoinder of charges in that charges based on the existence of an unlawful assembly had been joined with charges framed relying on section 32 of the Penal Code, T. S. Fernando, J., dismissed the appeals.

With special leave obtained, one of the accused appealed to the Privy Council. The main contention on behalf of the appellant has been summarised by Their Lordships thus: " It is said that though section 146 of the Penal Code creates a liability on a member of an unlawful assembly for an offence committed by another member of such an unlawful assembly in prosecution of the common object, yet it does not create an offence distinct from the offence committed by the other member. Accordingly it is said that though certain charges, *e.g.*, charges 2 (charge under 434 read with 146) and 5 (charge under 434) " were for the purposes of section 178 of the Criminal Procedure Code charges of distinct offences which required separate charges and required separate trials they did not come within 180 (1) because they did not for the purposes of that section involve ' more offences than one '. "

Held : (1) That the aforesaid charges based on unlawful assembly and those based on section 32 of the Penal Code are distinct offences. They could be joined at the same trial as the offences were committed " in one series of acts so connected together as to form the same transaction" within the meaning of section 180 (1) of the Criminal Procedure Code. Section 180 is an exception to section 178 of the Criminal Procedure Code which requires separate charges and separate trials in the case of distinct offences.

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(2) That it is a question for decision in any particular case whether the facts out of which charges have arisen are so closely connected and inter-related that it can fairly be said that there was one series of acts and that the acts by being connected constituted one and the same transaction.

Per THE JUDICIAL COMMITTEE :—

(*a*) " That it is well recognised that section 32 of the Penal Code expresses and declares a legal principle of law, but does not create a substantive offence. "

(*b*) " Whether a person has, in fact, committed an offence which he does not admit is the very question with which a trial is concerned. Their Lordships consider, therefore, that it cannot be doubted that the words ' more offences than one are committed ' must mean and must be understood as meaning more offences than one are alleged to have been committed. "

Their Lordships also made the following observations :—

(*a*) " The reaching of conclusion without any avoidable delay and the concentration upon issues of real relevance (both so desirable in criminal administration) are greatly assisted if those responsible for prosecutions make every reasonable effort to minimise the number of counts and to avoid complexity. "

(*b*) " If in a case where five or more persons are charged with an offence under section 140 and are also charged in a further count with an offence punishable under a section of the Penal Code read with section 146 and are also charged in another count with the offence punishable under the particular section it is found that only one of the persons charged actually committed the offence punishable under that particular section, . . . it is preferable that guilt on two only and not on all the three should be recorded. "

Disapproved : *Don Marthelis* v. *The Queen*, (1963) 65 N.L.R. 19 ; LXIV C.L.W. 30.
The Queen v. *Thambipillai*, (1963) 66 N.L.R. 58.

Cases referred to : *The King* v. *Heen Baba*, (1950) 51 N.L.R. 265 ; XLII C.L.W. 26.
Nanak Chand v. *State of Punjab*, A.I.R., (1955) S.C. 274.
Barendra Kumar Ghosh v. *Emperor*, A.I.R., (1925) P.C. 1.

The judgment of the Supreme Court is reported in LXIV C.L.W. 24.

E. F. N. Gratiaen, Q.C., with *T. O. Kellock* and *M. I. H. Haniffa*, for the appellants.

Mark Littman, Q.C., with *Dick Taverne*, for the Attorney-General.

LORD MORRIS OF BORTH-Y-GEST

The appellant was convicted and sentenced by the Magistrate's Court at Matara on the 12th July, 1962, and his appeal from that conviction was dismissed by the Supreme Court of Ceylon on the 6th May, 1963. In this appeal (brought by special leave) the main contention of the appellant is that at his trial there was a misjoinder of charges which rendered the charge sheet invalid and the trial void.

The appellant was the second of six persons who were accused. All were officers of the Excise Department. The accusations arose out of events which took place on the 27th December, 1960, and of which the respondent complained. The respondent's wife is Daisy Gunaratna Wickremasingha. The respondent has a brother, Mahanthi Mulle Gamage Gomis. The respondent alleged that during the afternoon of the 27th December, 1960, the six persons went by car to his house. According to his allegations the subsequent events were as follows. After the car was halted on his compound the six persons entered the verandah of his house. The first accused kicked him and the second (the appellant) struck him on the back of his neck. The third accused handcuffed him and the fourth, the fifth and the sixth accused pushed him into the car. When his wife pleaded with the party it was alleged that she was struck by the appellant with a baton. The respondent's brother came to see what the commotion was and he, it was alleged, was assaulted by the appellant who used his hands and by the fourth and fifth accused who used batons and he also was pushed into the car.

The respondent and his brother were, in fact, driven away. They were under arrest. One of the questions which had to be decided in the later proceedings was whether the appellant and his companions were, as they asserted, engaged as Customs Officers in a lawful raid in the course of

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which they arrested the respondent and his brother for being in wrongful possession of what was known as ganja.

The captives were taken to the Walgama Excise Station and later to the Matara Hospital where an allegation was made by the appellant that the respondent had ganja on him at the time that he was seized. The two men were thereafter released by the appellant on bail. They then went to the Police Station and complained of the assault made upon them. The respondent and his brother were later charged in the Magistrate's Court by the appellant with the unlawful possession of ganja. On the date of trial, which was not until July, 1961, a material witness (*i.e.*, the present appellant) was not present. The Magistrate refused an application for a postponement and acquitted the respondent and his brother. The prosecution did not appeal against the acquittal.

The respondent, as complainant, himself presented a plaint in the Magistrate's Court on the 18th January, 1961. His complaint in substance was that the appellant and his companions were bent on assaulting him and were covering themselves by fabricating a case against him of being in wrongful possession of ganja. His allegation was that the six accused were members of an unlawful assembly the common objects of which were to commit house-trespass and to cause hurt to him. He alleged that they had committed an offence under section 140 of the Ceylon Penal Code. He further alleged that the six accused did commit house-trespass and had committed an offence punishable under section 434 read with section 146 of the Ceylon Penal Code. He further alleged that they committed rioting by using force and violence and by assaulting him and his wife and his brother and had committed an offence punishable under section 144 of the Ceylon Penal Code.

On the 16th February, 1961, the respondent as complainant gave evidence in support of his plaint and the Magistrate directed the issue of a summons on the six accused with a copy of counts as then set out in their plaint. The hearing was to be on the 30th March, 1961. There were various adjournments (to the 1st June then to the 21st June then to the 27th July and then to the 3rd August and then to the 23rd August). On the 23rd August in the presence of the accused the respondent gave evidence. The Magistrate, being also a District Judge, on a consideration of the evidence, decided (pursuant to section 152 (3) of the Criminal Procedure Code) that he could properly try the case summarily and decided that he would do so. Charges were then framed. They were as follows :—

"IN THE MAGISTRATE'S COURT
OF MATARA.
No. 66552.

You are hereby charged that you did within the jurisdiction of this Court at Wewahamanduwa on the 27th December, 1960—.

1. Were members of an unlawful assembly the common objects of which were :—

(*a*) to commit house-trespass by entering into a building used as a human dwelling to wit : the house in the occupation of the complainant above-named situate on the land called Balagewatta at Wewahamanduwa aforesaid with intent to cause hurt to the complainant ;

(*b*) to voluntarily cause hurt to the complainant and that you did commit an offence punishable under section 140 of the Ceylon Penal Code.

2. That at the same time and place aforesaid and in the course of the same transaction set out in Charge 1 above ; you did in the prosecution of the said common object commit house trespass by entering into a building used as a human dwelling to wit : the house in the occupation of the complainant, M. M. G. Ariyadasa, situated on the land called Balagewatta aforesaid with intent to cause hurt to the complainant which said offence was in prosecution of the said common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common objects of the said unlawful assembly and that you being members of the said unlawful assembly are thereby guilty of an offence punishable under section 434 read with section 146 of the Ceylon Penal Code.

3. At the same time and place aforesaid and in the course of the same transaction you did commit rioting by using force and violence by assaulting the complainant, complainant's brother, M. G. Gomisappu, and complainant's wife, Daisy Wickremasingha, with hands and batons and that you have thereby committed an

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offence punishable under section 144 of the Ceylon Penal Code.

4. At the same time and place aforesaid and in the course of the same transaction set out in Charge 1 above, one or more members of the said unlawful assembly did cause hurt to M. G. Ariyadasa, M. G. Gomisappu and Daisy Gunaratna Menike Wickremasingha, which said offence was committed in prosecution of the said common object of the said unlawful assembly or was such that the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object of the unlawful assembly and that you being members of the said unlawful assembly did commit an offence punishable under section 314 read with section 146 of the Ceylon Penal Code.

5. At the same time and place aforesaid and in the course of the same transaction you did commit house-trespass by entering into a building used as a human dwelling to wit : the house in the occupation of M. M. G. Ariyadasa situate on the land called Balagewatta at Wewahamanduwa with intent to cause hurt to the said Ariyadasa and you have thereby committed an offence punishable under section 434 of the Ceylon Penal Code.

6. At the same time and place aforesaid and in the course of the same transaction you did wrongfully confine the said M. M. G. Ariyadasa at Wewahamanduwa and other places and that you did thereby commit an offence punishable under section 333 of the Ceylon Penal Code.

7. At the same time and place aforesaid and in the course of the same transaction you did wrongfully confine M. M. G. Gomisappu at Wewahamanduwa and other places and you did thereby commit an offence punishable under section 333 of the Ceylon Penal Code.

8. At the same time and place aforesaid and in the course of the same transaction you did voluntarily cause hurt to M. M. G. Ariyadasa and that you did thereby commit an offence punishable under section 314 of the Ceylon Penal Code.

9. At the same time and place aforesaid and in the course of the same transaction you, the 2nd, 3rd and 4th accused, did cause hurt to M. M. G. Gomisappu and did thereby commit an offence punishable under section 314 of the Ceylon Penal Code.

10. At the same time and place aforesaid and in the course of the same transaction that you, the 2nd accused above-named, did cause hurt to Daisy Gunaratna Menike Wickremasingha with an instrument which when used as a weapon of offence is likely to cause death, to wit, a baton and that you did thereby commit an offence punishable under section 315 of the Ceylon Penal Code."

To those charges each of the six accused pleaded Not Guilty. One of the charges (Charge 3 would not have been triable summarily but for the power given to the Magistrate (being also a District Judge) by the above-mentioned section of the Criminal Procedure Code. The trial was fixed for the 6th October. It was postponed to the 17th October, then to the 29th December, then to the 11th January, 1962, and then to the 22nd February, 1962. On that day the respondent again gave evidence as did his brother. On the evidence the Magistrate decided to assume jurisdiction. The accused pleaded Not Guilty. The further trial was fixed for the 17th April, 1962. The date was re-fixed for the 11th May. On that day the respondent again gave evidence as did his wife and his brother and other witnesses. The trial was resumed on the 9th June, 1962, when other evidence for the prosecution was given. The trial was resumed on the 21st June, 1962, when the first two accused gave evidence. The trial was resumed on the 5th July. The case eventually reached the stage of judgment on the 12th July, 1962. The first accused was acquitted altogether. All the other accused were found Guilty of the first seven charges. The appellant alone was found Guilty of the eighth charge. The appellant and one other (the fourth accused) were found Guilty of the ninth charge. The appellant was acquitted of the tenth charge. The appellant was sentenced to three months' rigorous imprisonment on each of Charges one to nine but the sentences were to run concurrently.

It is not necessary to record fully the conclusions of fact reached by the learned Magistrate. Suffice it to say that he found that some two days before the 27th December, 1960, the respondent had assaulted one of the accused because of certain unseemly behaviour on the latter's part. The learned Magistrate found that the fact that there had been such assault was the motive for

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a concerted attack on the respondent on the 27th December by the second to the sixth accused. They had purposely gone to the respondent's house in order " to teach him a lesson ". The learned Magistrate, therefore, rejected the evidence of the appellant (the second accused) to the effect that he had only been engaged upon a legitimate raid in connection with his duties as an officer in the Excise Department. The conclusion was that the accused who were convicted planned and carried out a concerted assault on the respondent in retaliation for an incident connected with one of their number.

The appellant and others appealed to the Supreme Court. By a judgment of the 6th May, 1963, T. S. Fernando, J., dismissed the appeals. Of the points argued in the Supreme Court on behalf of the appellant the only one which is now material was that there had been a misjoinder of charges in that charges based on the existence of an unlawful assembly had been joined with charges framed relying on section 32 of the Penal Code.

Certain sections of the Penal Code call for notice. Section 32 is as follows :—

" When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Section 140 is as follows :—

" Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

Section 146 is as follows :—

" If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

For the purposes of sections 140 and 146 the word " offence " denotes a thing made punishable by the Penal Code (*see* section 38).

Certain sections of the Criminal Procedure Code also call for notice. Section 178 is as follows :—

" For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 179, 180, 181, and 184, which said sections may be applied either severally or in combination."

Section 180 is as follows :—

" (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

" (2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them, may be charged with and tried at one trial for each of such offences, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

" (3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

" (4) Nothing contained in this section shall affect section 67 of the Penal Code."

Section 181 is as follows :—

" If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment ; or he may be charged with having committed one of the said offences without specifying which one."

Section 184 is as follows :—

" When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the Court thinks fit ; and the provisions contained in the former part of this Chapter shall apply to all such charges."

For the purpose of those sections " offence " means any act or omission made punishable by any law for the time being in force in Ceylon.

On behalf of the appellant it was argued in the Supreme Court that the trial was invalid in that some of the charges were joined with others in

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violation of the provisions of the above quoted sections. More specifically it was contended that even if all the ten alleged offences were committed in the course of one and the same transaction the joining together at one trial of charges 2, 3 and 4 with charges 5, 6, 7 and 8 amounted to a fatal misjoinder of charges. That contention was rejected by the Supreme Court and the appeal was dismissed.

Special leave to appeal was granted to the appellant. The appeal raises an important issue in connection with the administration of the criminal law in Ceylon and Their Lordships understand that some confusion exists concerning the law relating to the joinder of charges : indeed there are conflicting decisions in relation to the main point which arises in this appeal.

The main contention which has been advanced on behalf of the appellant may be summarised. It is said that though section 146 of the Penal Code creates a liability on a member of an unlawful assembly for an offence committed by another member of such an unlawful assembly in prosecution of the common object, yet it does not create an offence distinct from the offence committed by the other member. Accordingly it is said that though certain charges, *e.g.*, the charges in counts 2 and 5 were for the purposes of section 178 of the Criminal Procedure Code charges of distinct offences which required separate charges and required separate trials they did not come within section 180 (1) because they did not for the purposes of that section involve " more offences than one ". This contention which involves a reading of the words " distinct offence " in section 178 in a different sense from the words " more offences than one " in section 180 calls for closer examination. The argument runs as follows. If there is a count charging an offence say under section 434 read with section 146 then the allegation is that one or more of those who were members of the unlawful assembly committed house-trespass with the result that all are vicariously guilty of house-trespass : that being so a count under section 434 charging the direct commission of house-trespass cannot, so the argument runs, be joined and tried at the same time for that would be a charge of the same offence and there would not be charges of " more offences than one ".

It will be convenient to consider the appellant's contentions by reference to some of the counts in the charge. No question arises in regard to count 1. It alleged a definite offence which was undoubtedly a distinct offence. It alleged that the accused were members of an unlawful assembly, *i.e.*, that they were members of an assembly of five or more persons whose common object came within one of the objects defined in section 138. The count charged an offence punishable under section 140 of the Penal Code. Count 2 alleged an offence punishable under section 434 read with section 146 of the Penal Code. The allegation was that all the accused committed house-trespass in furtherance of the common object of the unlawful assembly. In order to convict the appellant on this count it was necessary to prove that he was a member of an unlawful assembly, that some member or members of the unlawful assembly committed the offence of house-trespass, and that such offence was either in prosecution of the common object of the assembly or was such as the members of the assembly knew to be likely to be committed in prosecution of that object. Thus if A, B, C, D, E and F are members of an unlawful assembly which has house-trespass in the house of O as its object, then if some of them commit house-trespass in the house of O and do it as members of the unlawful assembly and in prosecution of the common object all are guilty.

Where there are unlawful assemblies it will often be difficult for the prosecution to be sure at the outset as to which facts will be clearly proved. If the prosecution present a case that A, B, C, D, E and F were members of an unlawful assembly which had house-trespass in the house of O as its object and that some of the members committed house-trespass there would be a charge under section 434 read with section 146. If it was proved that A committed house-trespass but if it was not proved that there was an unlawful assembly or if it was proved that there was an unlawful assembly but if it was not proved that A was a member of it, there would have to be an acquittal of A of the charge under section 434 read with section 146. He would, however, have committed an offence under section 434. Nevertheless he could not be convicted of such offence on the charge as laid. This was illustrated by the decision in *The King* v. *Heen Baba*, 51 N.L.R. 265.

In that case the accused were charged (under section 146) with having committed as members of an unlawful assembly, the offences of house-breaking, robbery, grievous hurt and hurt (sections 443, 380, 383, and 382 of the Penal Code). The verdict of the jury was that there was no unlawful assembly but that the offences of house-breaking, robbery, grievous hurt and hurt were

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committed by the accused acting in furtherance of a common intention within the meaning of section 32 of the Penal Code. The presiding Judge had directed the jury that it was competent to them to find the accused guilty under sections 443, 380, 383 and 382 read with section 32. The jury did so find. The question for decision on appeal was whether it was competent for the jury to return a verdict of guilty of offences under those sections read with section 32 when those offences did not form the subject of separate charges but were referred to in charges coupled with section 146. It was held (and Their Lordships think rightly held) that in the absence of a charge the accused could not be convicted under sections 433, 380, 383 and 382 read with section 32. The case does not decide that charges under those sections could validly have been joined but the indications are that the Court so thought. There was certainly no suggestion that the accused could not thereafter be charged with offences under sections 433, 380, 383 and 382. Nor could it be said that they had been acquitted of those offences. The missing charges were charges of different offences and it would be unfortunate and undesirable if in such a situation separate and later proceedings were always necessary.

There is a difference between the situation where someone who is a member of an unlawful assembly commits an offence as such member and in prosecution of the common object of that assembly and the situation where someone commits a similar offence without there being the existence of an unlawful assembly.

To a like effect as the actual decision in *Heen Baba's* case is the decision in *Nanak Chand* v. *State of Punjab*, A.I.R. (1955) S.C. 274. (The provisions of section 32 and section 146 of the Ceylon Penal Code correspond respectively to sections 34 and 149 of the Indian Penal Code).

If five or more people are charged in one count with an offence punishable under section 434 read with section 146 and in another count with an offence punishable under section 434 they are being charged with what are, for all practical purposes, distinct and separate offences. It would be wrong to regard them as being in reality one offence. That this is so is illustrated by considering the nature and extent of the evidence which could establish guilt in respect of each count. Thus if it were not established that there was an unlawful assembly (as for example if it were not shown that there was an assembly of five or more persons but only of a lesser number) there could not be a conviction in respect of the former count but the evidence might establish that house-trespass was committed by one of them or alternatively by some of them in furtherance of their common intention in which cases either that one or those of them (who might number less than five) who had that common intention could be convicted of the latter count. It is well recognised that section 32 of the Penal Code expresses and declares a legal principle of law but does not create a substantive offence.

Proof that there was an unlawful assembly might fail for lack of proof that those composing an assembly of five or more had a common object which was within any one of the requirements of section 138 of the Penal Code. If, on the other hand, membership of an unlawful assembly was established, and membership at the time that an offence was committed by some member or members in prosecution of the common object of the assembly, and if the offence was such as the members of the assembly knew to be likely to be committed in prosecution of the common object, there could be conviction of a charge of the offence (under its appropriate section read with section 146). In such a case it would not, however, necessarily be the case that, if the principle of section 32 had to be relied upon, there would be a conviction of a charge of the offence. Though the offence was one known to be likely to be committed in prosecution of the common object (see the language of section 146) the criminal act might not have been done " in furtherance of the common intention of all " (as section 32 requires).

Under section 32 criminal liability results from the doing of a criminal act in furtherance of the common intention : under section 146 criminal liability may result merely from the membership of the unlawful assembly at the time of the commission of an offence known to be likely to be committed in prosecution of its object. As was said in *Nanak Chand* v. *State of Punjab* (*supra*) " An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the com-

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mon object, every member of the unlawful assembly would be guilty of that offence although there may have been no common intention and no participation by the other members in the actual commission of that offence. "

In delivering the judgment of the Board in *Barendra Kumar Ghosh* v. *Emperor*, A.I.R. (1925) P.C. 1, Lord Sumner said (at page 7) :—" There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and, indeed, may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of section 34 is replaced in section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all. "

In *Don Marthelis* v. *The Queen* (in 1963) 65 N.L.R. 19, there were certain counts which were based on the allegation of unlawful assembly and certain other counts which related to the offences of causing simple hurt and committing mischief which were based on common intention. Crown Counsel in that case conceded that the joinder of the two sets of charges was not according to law and that the result was that the indictment was invalid. Accepting the concession of Crown Counsel the Court quashed the convictions.

In the present case T. S. Fernando, J., felt himself free not to follow *Don Marthelis*' case. Their Lordships consider that he was right in not following it. He did, however, point out that the effect of joining charges must be understood as limited by the provisions of section 67 of the Penal Code.

It follows from what Their Lordships have set out that they are unable to agree with the decision in *The Queen* v. *Thambipillai*, (1963) 66 N.L.R. 58.

In the present case five of the accused (the appellant and four others) have been held guilty of house-trespass. They have been held guilty of being members of an unlawful assembly the common object of which was to commit house-trespass. Each one was, therefore, guilty under count 2 of the offence of house-trespass at any rate as committed by the other four while being separately guilty under count 5 of the distinct and separate house-trespass which he personally committed.

In passing Their Lordships would observe that the wording employed in the opening part of count 2, viz., " you did in the prosecution of the said common object . . .", is perhaps inappropriate where section 146 is being invoked. The wording employed in count 4 incorporating, in the opening part, the wording " one or more members of the said assembly did ", etc., and concluding " and that you ", etc., would seem to their Lordships to be more appropriate.

For the reasons which have been set out their Lordships conclude that a count for an offence punishable under section 434 read with section 146 and a count for an offence punishable under section 434 are counts which accuse of distinct offences. If section 178 did not set out exceptions there would have to be separate charges and separate trials. One exception to that requirement is contained in section 180. The opening words of that section are " If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged . . ." Whether a person has, in fact, committed an offence which he does not admit is the very question with which a trial is concerned. Their Lordships consider, therefore, that it cannot be doubted that the words " more offences than one are committed " must mean and must be understood as meaning more offences than one are alleged to have been committed.

Their Lordships are quite unable to accept the submission that a charge of an offence punishable under section 434 read with section 146, and a charge of an offence punishable under section 434, relate to the same offence so as to make inapplicable the exception (set out in section 180 (1) which applies if in one series of acts so connected together as to form the same transactions more offences than one are alleged to have been committed by the same person.

In the present case their Lordships consider that the offences if committed were committed " in one series of acts so connected together as to form the same transaction " within the meaning of the words in section 180 (1). It is a ques-

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tion for decision in any particular case whether the facts out of which charges have arisen are so closely connected and inter-related that it can fairly be said that there was one series of acts and that the acts by being connected constituted one and the same transaction. It follows, therefore, as was decided by the learned Judge, T. S. Fernando, J., that there was no misjoinder of charges.

This conclusion suffices to dispose of the appeal and their Lordships will humbly advise Her Majesty that it be dismissed. Their Lordships think that it is desirable that they should refer to one matter which was discussed in the course of the arguments. They would preface this reference by a reminder that the reaching of conclusion without any avoidable delay and the concentration upon issues of real relevance (both so desirable in criminal administration) are greatly assisted if those responsible for prosecutions make every reasonable effort to minimise the number of counts and to avoid complexity.

One matter in particular to which reference may be made relates to the decisions of the learned Magistrate on counts 4 and 8. For the reasons already expressed their Lordships have concluded that the joinder of those counts was unobectionable. It was submitted, however, that there ought not to have been findings of guilt against the appellant on both counts 4 and 8. The finding of the learned Magistrate in regard to count 8 (which charged all the accused with voluntarily causing hurt to the respondent, an offence punishable under section 314) was that the appellant alone (and not the others) was guilty. The appellant was also (together with the other accused except the first) found guilty on count 4. That count which alleged an offence under section 314 read with section 146, alleged the causing of hurt to the respondent and his brother and his wife. As to that the finding of the learned Magistrate was thus expressed—" The 2nd, 4th and 5th accused have, whilst being members of an unlawful assembly, caused simple hurt to Ariyadasa and Gomis and thereby all the members of the unlawful assembly have been guilty of an offence under section 314 read with section 146 of the Penal Code ". That was a reference to count 4. There can be no criticism of the finding or of the conclusion that all were guilty. In view of the finding just quoted it is not clear why on the 8th count the finding was that it was only the 2nd accused (the present appellant) who assaulted Ariyadasa and who alone was, therefore, guilty on the 8th count. It was suggested that it was erroneous for the appellant to have been convicted on the 8th count as well as on the 4th count. Even accepting however that he alone was guilty on the 8th count he was also guilty on the 4th count if any one of the others caused hurt to Gomis. The 4th accused was, in fact, held guilty of causing hurt, at least, to Gomis even, if contrary to the finding above quoted, he did not additionally cause hurt to Ariyadasa.

On the conclusions of the learned Magistrate his findings of guilt as recorded cannot, therefore, be assailed.

The question which was discussed in argument was as follows. If in a case where five or more persons are charged with an offence under section 140 and are also charged in a further count with an offence punishable under a section of the Penal Code read with section 146 and are also charged in another count with the offence punishable under the particular section it is found that only one of the persons charged actually committed the offence punishable under the particular section, ought he to be found guilty (apart from section 140) on more than one of the two other counts ? Thus if five or more persons form an unlawful assembly the object of which is to commit house-trespass they are all guilty of an offence under section 140. They may additionally be charged with an offence under section 434 read with 146. They may additionally be charged with an offence under section 434. If when the facts are ascertained it is found that one only of the group actually committed house-trespass the question arises as to the correct findings in his case. All are guilty of the offence under section 140. All are guilty of the offence under section 434 read with section 146. In some circumstances and upon certain findings they might (as a result of the provisions of section 32) be guilty of the offence under section 434. The actual house-trespasser would be guilty of the offence under section 434. All would undoubtedly be guilty of two offences but the question arises whether the actual house-trespasser should be found guilty of all three offences and whether (in certain circumstances) all the others might be found guilty of all three offences. The problem may be merely academic and so far as sentence is concerned may be of no consequence. Their Lordships would think it preferable that guilt on two only and not on all three of the counts should be recorded but as the point has not arisen and as

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their Lordships accordingly cannot have the benefit of the considered views of the Court in Ceylon upon it and as it does not immediately arise Their Lordships consider that they must reserve consideration of it.

For the reasons already given Their Lordsship will humbly advise Her Majesty that this appeal should be dismissed.

Appeal dismissed.

Present : **T. S. Fernando, Tambiah and Alles, JJ.**

B. DANIEL SILVA *vs.* K. H. G. JOHANIS APPUHAMY & OTHERS

S.C. No. 45 (*Final*) *of* 1962—*D.C. Galle, X.* 2827.

Argued on : 3rd and 4th March, 1965.
Decided on : 29th June, 1965.

Bills of Exchange Ordinance, sections 98 (2), 82—*Cheque—Drawn in favour of firm and crossed " not negotiable "—Stolen from drawer—Forgery of payee's indorsement—Cheque tendered to defendant who takes it for value and in good faith—Defendant paid by drawer's bank—Whether drawer can sue defendant for the return of the amount of the cheque— Civil Law Ordinance* (*Cap.* 79), *section* 3.

Delict—Roman-Dutch Law—Conversion—Whether tort of conversion is part of the law of Ceylon? —English common law on this point not brought in by section 98 (2) *of Bills of Exchange Ordinance and section* 3 *of Civil Law Ordinance.*

The plaintiff drew a cheque crossed " Not negotiable " for Rs. 1,117.25 in favour of the payee. It was stolen from the drawer, and the payee's indorsement was forged. Subsequently it was tendered to the defendant in payment for a radio set by a person who was unknown to the defendant. The defendant accepted the cheque, credited it to his account, and when the cheque was realised, handed over the radio set and the balance sum of Rs. 925.25 to this person who could not be traced thereafter.

The plaintiff sued the defendant for the recovery of the sum of Rs. 1,117.25 and in the plaint averred that the indorsement of the payee on the cheque had been forged, that the defendant had no title to the cheque, and consequently had no lawful authority to convert the cheque to his own use.

The defendant stated in his answer that he took the cheque *bona fide* and for value and denied that any cause of action accrued to the plaintiff to sue him for recovery of the amount represented by the cheque.

Held : (1) That the plaintiff's action was founded on delict and called for the application of the Roman-Dutch Law.

(2) That on the pleadings it was manifest that the action was one for conversion and such an action was not available under the Roman-Dutch Law, although it was available under the Common Law of England.

(3) That section 98 (2) of the Bills of Exchange Ordinance was only intended to apply to any ommissions or deficiencies in the Ordinance, in the law relating to negotiable instruments, and could not form the basis of the proposition that where the subject matter of a conversion is a cheque, the English common law of conversion was introduced into the law of Ceylon. Section 3 of the Civil Law Ordinance, too, does not have the effect of bringing in the English Law on this point.

(4) That, therefore, the action instituted against the defendant was not maintainable in law.

Cases referred to : *Morrison* v. *London County and Westminster Bank, Ltd.*, (1914) 3 K.B. 356 ; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481
John Bell & Co., Ltd. v. *Esselen*, (1954) 1 S.A.L.R. 147.
Morobane v. *Bateman*, (1918) A.D. 460.
Thompson v. *Mercantile Bank*, (1935) 15 C.L. Rec. 61.
Hongkong and Shanghai Bank v. *Krishnapillai*, (1932) 33 N.L.R. 249; 1 C.L.W. 149; 9 Times of Ceylon L.R. 81
Mitchell v. *Fernando*, (1945) 46 N.L.R. 265 ; XXX C.L.W. 57
Dodwell & Co., Ltd. v. *John*, (1918) 20 N.L.R. 206; 1918 A.C. 563
Punchibanda v. *Ratnam*, (1944) 45 N.L.R. 198.
Bank of Ceylon v. *Kulatilleke*, (1957) 59 N.L.R. 188.
Midland Bank v. *Reckitt*, (1933) A.C. 1; 102 L.J.K.B. 297; 137 L.T. 817
Lloyd's Bank Ltd. v. *Savory & Co.* (1933) A.C. 201
Kleinwort Sons & Co. v. *Le Comptoir National D'escompte de Paris*, (1894) 2 Q.B. 157; 10 T.L.R. 424; 63 L.J.Q.B. 674.

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Karonchihamy v. *Angohamy*, (1904) 8 N.L.R. 23.
Wijekoon v. *Gunewardena*, (1892) 1 S.C.R. 147 ; 2 C.L.R. 59
Weerasekera v. *Peiris*, (1932) 34 N.L.R., 281 ; II C.L.W. 99 ; 1933 A.C. 190 ; 10 Times of Ceylon L.R. 98
Hollins v. *Fowler*, (1875) L.R. 7, H.L. 757 ; 33 L.T. 73 ; 44 L.J.Q.B. 169
Yorkshire Insurance Co. v. *Standard Bank*, (1928) W.L.D. 251.
Norwich Union Fire Insurance Society, Ltd. v. *Banque Canadienne Nationale*, (1934) 4 Dominion L.R. 223.
Leal & Co. v. *Williams*, (1906) T.S. 554.

C. Ranganathan, with *M. T. M. Sivardeen* and *M. Sivanandam*, for the defendant-appellant.

S. Gunasekera, with *Miss P. Abeyratne*, for the plaintiffs-respondents.

T. S. Fernando, J.

The plaintiffs who are carrying on business in partnership at Galle drew on August 18, 1960, a cheque for Rs. 1,175.25 upon the Galle branch of the Bank of Ceylon. This cheque was made payable to Abdulhassen Davoodbhoy, a firm in Colombo, to which the plaintiffs owed this sum of Rs. 1,175.25 for goods supplied to them. The cheque was crossed and marked " not negotiable". The District Judge who heard the case was doubtful as to whether the plaintiffs posted the cheque addressed to their creditor or whether it was lost while still in the plaintiffs' place of business at Galle. It was established at the trial that this cheque had been presented at the bank on August 22, 1960, by the defendant who is a dealer in radio and photographic equipment and who himself had an account at this bank. The sum of Rs. 1,175.25 represented by the cheque was credited by the bank to the account of the defendant and a like sum was debited to the account of the plaintiffs. It was also established that the endorsement of the payee had been forged and that the forger or someone on his behalf had tendered the cheque to the defendant in part-payment of a radio set valued at Rs. 250/-. The defendant proved that he delivered the radio set and the balance Rs. 925.25 to the person who presented the cheque to him and who had endorsed the cheque as Abusalie, purporting to do so on behalf of the firm of Abdulhussan Dawoodbhoy utilising for the purpose also a forged frank of the payee. The endorser " Abusalie " was not known to the defendant and was never traced thereafter.

So much for the facts established at the trial. The defendant-appellant contended that on these facts no cause of action accrued to the plaintiffs to sue him. In the plaint filed in this suit against the defendant claiming to recover from the latter the sum of Rs. 1,175.25. the plaintiffs averred that the endorsement of the payee of the cheque had been forged, that the defendant had, therefore, no title to the cheque and consequently had no lawful authority to convert the cheque to his own use. The defendant in his answer, stating that he was a *bona fide* holder for value in due course, denied that any cause of action accrued to the plaintiffs to sue him for recovery of the sum represented by the cheque. At the trial an issue was raised at the instance of the defendant as to whether the plaint disclosed any cause of action against him.

As has been stated above already, the trial judge was doubtful whether the cheque was lost in transit in the post or whether it was stolen from the plaintiffs' place of business. He dealt with the case as if the cheque had been posted to Abdulhassan Dawoodbhoy, but had been lost in transit. Holding that there was no proof of express or implied authority given by the payee to the plaintiffs to make payment by post, he held that property in the cheque had not passed to the payee but remained in the plaintiffs. The conclusion on this point would not have been different even if he had held that the cheque had been stolen while it was still in the hands of the plaintiffs. The property in the cheque would in either event have remained in the plaintiffs.

On the pleadings in the suit it is difficult to resist the conclusion that the defendant was sued in respect of the tort of conversion. That was, indeed, the point the defendant in effect pleaded in answer to the claim, but the learned trial judge in his judgment refused to consider this point for the reason that the defendant in his answer had not specified the ground on which he had pleaded that no right to sue had arisen. As I have stated already, the point was specifically raised in the form of an issue at the trial, and, if the plaintiffs thought that the plea was vague or too general, it was open to them to have asked for clarification.

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Although the trial judge stated in the course of his judgment that he was not prepared to consider the point that an action for conversion does not lie under our law, he permitted himself the observation, in passing, that it is a moot point whether the English Common Law relating to the action grounded on conversion had not displaced the Roman-Dutch law on this matter. He went on to express his own opinion that where the subject-matter of a conversion is a cheque, section 98 (2) of the Bills of Exchange Ordinance, (Cap. 82), requires that the English Common Law should apply.

On the facts of this case, it would appear that under the English Common Law the plaintiffs would have been entitled, *prima facie*, to recover the sum claimed either as damages for conversion or as money had and received—*see Morison* v. *London County and Westminster Bank, Ltd.*, (1914) 3 K.B. 356. As Lord Reading, C.J., said there—at p. 365 :—" The plaintiff has lost the sums which the defendants have wrongfully recovered, and the plaintiff is, therefore, entitled to recover such sums as damages for the conversion . . . The same result would be reached by the plaintiff upon the alternative claim for money had and received ". Under that law, in an action for conversion of a cheque there are only two matters to be established by a plaintiff. First, ownership ; second, that the defendant without title and without authority has converted the cheque.

Under the Roman-Dutch law, the basic doctrine is that without fraud or fault there is no liability. As stated in " The Law of Delict in South Africa " by McKerron (2nd ed.), p. 34 :—" ignorance of the wrongful character of the act excludes *dolus*. Thus, a person who *bona fide* acquires stolen property and *bona fide* parts with it incurs no liability to the true owner ". Again,—at p. 225 :—

> " It may be noted that the English doctrine of conversion is not part of our law. According to that doctrine a person who by an unauthorised act has deprived another permanently or for an indefinite time of the possession of property to which he was entitled is liable to account to him for the full value of the property, even though he was ignorant of the fact that the property belonged to someone else. By our law, however, a person who has by purchase or otherwise acquired property belonging to another and has subsequently parted with it is under no obligation to the true owner, unless he either knew or had reason to believe that the title was bad. Actual knowledge or suspicion must be proved : the mere omission to make inquiries is not enough to ground liability."

Reference, may, at this stage, be made to the decision of the Privy Council in the local case of *Dodwell & Co., Ltd.* v. *John*, (1918) 20 N.L.R. 206, in the course of which it was observed, *obiter*, that " it may well be true that the principles of the English Common Law have been so far recognized in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place ". It must, however, not be overlooked that Their Lordships dealt with the case before them on the footing that, if the appellants (in that case) received the money with notice of a trust affecting it, they would be bound to account for it to the respondents. The case was not dealt with in the Privy Council as if there had been a suit, firstly, for money had and received, or secondly, as for a conversion. These two forms of claims were considered unnecessary. In the South African case of *John Bell & Co., Ltd.* v. *Esselen*, (1954) 1 S.A.L.R. at 153, Centlivres, C.J., in relation to *Dodwell's case*, citing *Morobane* v. *Bateman*, (1918) A.D., at 465-66, observed that the doctrine of conversion is unknown to Roman-Dutch law. In *Morobane's case*, Innes, C.J., had stated :—

> " but the purchaser of property belonging to a third person who has redisposed of it may nevertheless under certain circumstances be held accountable to the true owner. If the purchaser acquired and resold the property *mala fide* and with knowledge of the theft, then he would be liable to the owner, because he would virtually be party to the delict, and would be regarded in the same position as if he had fraudulently parted with possession. But if the acquisition and the resale had been *bona fide* then there would be no liability to make good the value. Because the good faith of the purchaser would protect him against a claim *ex delicto*, and there would be no contractual relationship, and no consideration of natural equity."

There is another case to be noticed. In *Punchibanda* v. *Ratnam*, (1944) 45 N.L.R. 198, where the question argued at the stage of appeal appears to have been limited to one relating to the quantum of damages upon a certain action filed, it has been assumed that the English law of Conversion was part of our law. The question as to whether the law governing the right of action was not Roman-Dutch law does not there appear to have received consideration. Certainly, an earlier decision of this Court in *Thompson* v. *Mercantile Bank*, (1935) 15 Law Rec. 61, where it had been held that it was the Roman-Dutch law that should be applied had not been cited or considered.

In the case before us for decision, the issue having been raised as to whether the plaint disclosed a cause of action against the defendant,

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an answer to it required to be considered on the basis of the law applicable, *i.e.*, whether it was the English Law or the Roman-Dutch Law. The action being one founded on a delict, in my opinion, the Roman-Dutch law called to be applied. On the pleadings it was manifest that the action was one for conversion, and such an action was not available. The issue should, therefore, have been answered against the plaintiffs.

There is one point remaining that needs consideration by us. In the savings clause of the Bills of Exchange Ordinance, (Cap. 82)—section 98 (2)—it is enacted that—

> "The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques."

The learned trial judge was inclined to take the view that, as section 3 of the Civil Law Ordinance, (Cap. 79), had introduced into Ceylon the law of England with respect to banks and banking, that section and section 98 (2) of the Bills of Exchange Ordinance had the effect of making available in Ceylon the right of action given by the English common law to a person placed in the position of the plaintiffs' firm. It was brought to our notice that this Court in *Bank of Ceylon* v. *Kulatilleke*, (1957) 59 N.L.R. 188, in holding that the drawer of a cheque was entitled to succeed in a claim against a collecting banker for recovery of the sums paid out on fraudulently altered cheques, has stated that in view of section 3 of the Civil Law Ordinance the case fell to be decided according to the law of England. It was submitted to us that this case has not been correctly decided. It is sufficient to observe that the question whether the action was really one where the banker was sought to be made liable on the basis of conversion did not receive attention by the Court ; nor were certain relevant authorities referred to in the judgment of the Court.

Section 98 (2) of the Bills of Exchange Ordinance was, in my opinion, only intended to apply to any omissions or deficiencies in the Ordinance in respect of the law relating, *inter alia*, to cheques, and cannot form the basis of a proposition that, where the delict of conversion was in relation to a cheque, therefore, the English common law of conversion is introduced into our law.

In *Hongkong and Shanghai Bank* v. *Krisnapillai*, (1932) 33 N.L.R., at 253, where an application had been made by the assignee in insolvency for an order or Court to sell certain shares alleged to be the property of the insolvent, an application resisted by certain banks to which shares had been pledged with right to sell without reference to Court, Drieberg, J. (with whom Garvin, J., agreed) stated :—" It was contended that as Ordinance No. 22 of 1866 (the Civil Law Ordinance) introduced into the Colony the law of England in all questions relating to banks and banking they have the same rights in the matter of realizing these securities as they would under the law of England. But the right of a pledgee to sell his securities without recourse to a Court of law is peculiar to the English law of pledge and the common law of the land in the matter of rights of mortgage and pledge does not give place to the English law when the mortgagee or pledgee is a bank ". This decision was followed in an analogous case by Howard, C.J., and Keuneman, J., in *Mitchell* v. *Fernando*, (1945) 46 N.L.R., at 269, where it was unsuccessfully sought to maintain an argument that, as the Civil Law Ordinance introduced into Ceylon the law of England with respect to joint-stock companies, therefore, a mortgage of shares in a company was governed by the relevant rules of English law. The Court rejected this argument by stating that the question related not to joint-stock companies but to mortgage of movables, a subject governed by the Roman-Dutch Law.

The defendant was right, in my opinion, when he contended throughout the trial that the action instituted against him was not maintainable. I would, therefore, allow his appeal and direct that the plaintiffs' action be dismissed with costs in both Courts.

Alles, J.

I agree with the judgment of my brother, Fernando.

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TAMBIAH, J.

I agree with the findings of my brother, Fernando, J. Since this is a matter of importance and interest, I wish to deal with the question whether the English doctrine of conversion is part of our law. The question to be decided is whether the plaint, which sets out in unmistakable language a cause of action based on the English doctrine of conversion, discloses a cause of action.

In England, the wrong of conversion consists in " an act of wilful interference with a chattel, done without lawful justification, whereby any person entitled to it is deprived of its use and possession ", (*vide* Salmond on the Law of Torts, 7th Ed., page 375). There are three distinct methods by which a man may deprive another of his property and become liable in the special action known as the " action of trover " under the English Law. A person may incur liability by taking a chattel belonging to another or by wrongful detaining or disposing of it. Corresponding to these methods of wrongful deprivation, there were three distinct forms of action provided by the English Common Law, namely, (1) *trespass de bonis asportatis*, for wrongful taking ; (2) *detinue*, for wrongful detention ; and (3) trover, for wrongful conversion (that is to say, disposal). Trover was simply a variant of the form of action known as detinue, the only material difference being that in trover the defendant was charged with wrongfully converting the property to his own use, while in detinue, he was charged with unjustly detaining it.

Soon trover became established and it began to extend its boundaries and succeeded in appropriating almost the whole territory both of trespass and of detinue. It became a general remedy applicable in almost all cases in which a plaintiff has been deprived of his chattels whether by way of taking, by way of detention or by way of conversion. The action for trover gradually developed into the general action for conversion by detention.

Negotiable instruments and other securities such as guarantees, considered as corporeal property, are simple pieces of paper. Their sole value is as choses in actions. But when they are unlawfully converted or detained the Courts gave a remedy to the person who is entitled by giving damages to the extent of the loss (*vide Midland Bank* v. *Reckitt*, (1933) A.C. 1 ; *Savory & Co.* v. *Lloyd's Bank*, (1933) A.C. 201 ; *Kleinwort Sons & Co.* v. *Le Comptoir National D'escompte de Paris*, (1894) Q.B. 674, Vol. 63). The English Courts granted this remedy by a process of extension by treating the cheque, the subject-matter of conversion, as a chattel, which was converted into money.

A party could waive the action based on tort and bring an action for money had and received under the English Law. This form of action was known as assumpsit, and was applicable to cases in which a person may be required to re-pay to another money which had come into possession under circumstances which disentitled him to retain it. Although at one time, in the hands of Lord Mansfield, this class of case threatened to expand into the vagueness of moral obligation, it is reducible to certain groups of circumstances which are now clearly defined. Among these may be mentioned, cases of money obtained by wrong such as payments under contract induced by fraud or duress ; cases of money paid under such mistake of fact as creates belief in the payer that a legal liability rests on him to make payment and cases of liability to repay the money paid for a consideration which has wholly failed. This action for want of a better term, is said to be based on a quasi-contract, and is also granted to a person who is the owner of a cheque which is the subject-matter of conversion. The action for conversion is, therefore, based on tort and the action for money had and received was based on quasi-contract, which is peculiar to the English Law.

The question is whether the tort of conversion or the action for money had and received has ever been received into our legal system.

The Roman-Dutch Law is the common law or the general law of Ceylon. It is a legacy of the Dutch to this Island and although it has ceased to be the law governing Netherlands, the home of its origin, it has thrived on the soil of Ceylon, although to a lesser degree of growth than in South Africa.

During the Dutch regime the States General in Holland seldom legislated for the Dutch Colonies. The Dutch ruled Ceylon by a series of statutes enacted in Batavia, and by placaats promulgated by the Dutch Council in Ceylon. After nearly a century of Dutch occupation, a compilation of these were made by Mr. Johan Maetsuyeker. This was done on the instructions of Governor Van Diemen and these came to be known as the " Old Statutes of Batavia ". It consolidated all

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the laws in force in the Colonies at that time. By a resolution of the Dutch Council of Ceylon dated 3rd March, 1666, the Old Statutes of Batavia were made applicable to Ceylon (*vide Karonchihamy* v. *Angohamy*, (1904) 8 N.L.R. 23). The Statutes of Batavia which modified the Roman-Dutch Law to suit the legal climate of the Dutch East Indies over-rode the statutes passed locally in the Dutch Colonies whenever there was a conflict.

Almost a century later, it became necessary to make a new collection of the statutes of Batavia, in view of the number of statutes promulgated in Batavia which altered and supplemented the Old Statutes of Batavia. It was compiled on the instructions of Governor Vander Parra and was published in September, 1766. Although this new collection never received full legislative authority and was never formally introduced into Ceylon, yet there is ample evidence that this collection was applied in Ceylon (*vide Van Clief's case* in Vanderstraten's Appendix).

The States General seldom legislated for the colonies. During the Dutch era in Ceylon, apart from customary laws, the Dutch ruled by the placaats issued by the Dutch Council in Ceylon and the Statutes of Batavia. The Statutes of Batavia provided that a *casus omissus* should be governed by the Roman-Dutch Law. It is in this manner that the Roman-Dutch Law was introduced into Ceylon. During the Dutch period, many works of the Roman-Dutch writers were cited in Courts (*vide* the Roman-Dutch Text Books in the Library of the Courts of Ceylon during the Dutch regime, by H. W. Tambiah ; Ceylon Law College Review, 1960/61, p. 44 *et seq*).

When the British took over the reins of government those who were called upon to administer justice were often recruited from the English Bar. They were not conversant with Dutch or medieval Latin. The Roman-Dutch authorities, save a few works which were translated into English, were rarely cited. Those trained in English legal traditions naturally turned to English decisions and text books for the exposition of the law. In this setting it became uncertain as to what was the general law of the land. Consequently, the Proclamation of 23rd September, 1799, (which is now incorporated in the Adoption of the Roman-Dutch Law Ordinance, Cap. XII) was enacted. The preamble to this Proclamation stated that " The Laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies or to expedient or useful alterations as to render a departure therefrom either absolutely necessary and unavoidably or evidently beneficial or desirable " should be applied.

The Statutes of Batavia and the placaats promulgated by the Dutch Council in Ceylon were gradually forgotten and the Courts thereafter assumed that the general principles of the Roman-Dutch Law, as expounded by writers, such as Voet, Grotius and Vanderlinden applied in Ceylon.

Here again the whole of the Roman-Dutch Law was never accepted in Ceylon. The Courts adopted what has been described by Wood Renton, C.J., (*vide* Roman-Dutch Law in Ceylon under the British Regime, (1932) 49 S.A.L.J. 161) as the " eclectic attitude " in adopting so much of the Roman Law as " suited our circumstances (*vide Wijekoon* v. *Goonewardena*, (1892) 1 S.C.R. 147, at 149). Fiscal measures and tenures peculiar to Holland were never received in Ceylon. Thus, for instance, the rule of Roman-Dutch Law prohibiting donations to religious houses and gifts for pious causes was never enforced in Ceylon (*vide* 1843 *Ramanathan Reports* 132).

The Royal Commission known as the Colebrooke-Cameron Commission which was sent to investigate into the administration of Ceylon and suggest reforms formulated a number of questions and obtained some instructive answers which threw much light on the adoption of the Roman-Dutch Law by the Dutch. In *Karonchihamy* v. *Angohamy*, (1904) 8 N.L.R. 1, at 10, Moncreiff, A.C.J., cites some of the answers given to questions 9, 15 and 16. From these answers it is clear that the laws administered by the Dutch consisted of " the old Roman-Dutch Law, partly of the customs of the natives, partly of the local statutes or regulations enacted in the time of the Dutch and also the British. "

The question as to how far the Statutes of Batavia were applied is answered thus : " The Statutes of Batavia are necessarily admitted, because the Government of that Island, having been superior to the Government of Ceylon, had power to modify or disallow the regulations of the latter. Vander Parra's collection is considered of the greatest value. "

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To the question "Are they (the statutes) often referred to in the Courts, and are they enforced in cases where they deviate from the provisions of the Roman-Dutch Law as expounded by the Dutch Commentators ?" the following answer is given : "They must necessarily be admitted as paramount to all authorities when applicable to the present state of the Island". Moncreiff, A.C.J., rightly observed that this answer was possibly given in reference only to the Statutes of Batavia (*vide* 8 N.L..R 11).

The question as to how far the Roman-Dutch Law was resorted to when the Muhammedan Law and the *Thesawalami* contained no provisions, was answered as follows : "Where the native laws and customs have not been compiled, we refer, if the subject of dispute arise among Muhammedans, to the most learned and best informed among them. In disputes among Malabars we should pursue a course nearly similar. But in other cases we consider the Roman-Dutch Law as the rule by which causes ought to be decided ; and whenever that is silent, we must refer to the laws of Rome". It may be mentioned that the Courts abandoned this practise of resorting to expert evidence owing to the unreliability of those who professed to be experts.

It should be remembered that the answers cited above only applied to what was termed the Maritime Provinces of Ceylon. A separate set of questions addressed by the Colebrooke Cameron Commission and the answers given to them give an insight into the sources of Kandyan Law as applied in the Kandyan Provinces by the British. When the Kandyan Provinces were brought under the general administration of the Island the Roman-Dutch Law was applied in matters where the Kandyan Law was silent.

It is significant that in none of these answers is English Law said to be applicable. This Royal Commission visited Ceylon before the Charter of 1833 was enacted. As stated earlier in administering the "Laws and institutions that subsisted under the ancient Government of the United Provinces" the Courts appear to have forgotten the Statutes of Batavia and followed the Roman-Dutch Law as found in the writings of Grotius, Voet and Vanderlinden without adopting any rules which had only a local application in Holland.

It is important to consider how far statute law of Holland was adopted in Ceylon. The general statute law of Holland which altered the Roman-Dutch Law on any topic to which this system applied, became part of the Law of Ceylon provided the placaat was enacted prior to the Dutch occupation of Ceylon and did not deal with any fixed measures or matters which had local application in Holland. Any statute passed in Holland after the Dutch occupation of Ceylon must be shown to have been recognised or adopted in Ceylon (*vide Karonchihamy* v. *Angohamy*, 8 N.L.R. 1).

In dealing with the applicability of Roman-Dutch Law in Ceylon, Thompson who was one of the earliest writers on the Laws of Ceylon, says—

> "The general, or as it is popularly termed, the common law of Ceylon, is obtained from treatises on the Roman-Dutch Law, that is, the Roman civil law, added to or abrogated by the feudal customs, and federal or state statutes of the United Provinces of Holland. These variations, additions, or abrogations, appeared not only in the statute books of Holland, but in respect of Dutch customs of judicial decisions, and in learned treatises of jurisconsults, which bear almost the authority of such decisions. In respect, therefore, of its Roman basis, the Roman-Dutch law may, perhaps, be looked upon as written law ; but, in respect of the Dutch decisions and, commentaries, as unwritten law. From this Roman-Dutch Law, which is popularly regarded as the common law of the great part of Ceylon, Dutch feudalism and local custom must be largely subtracted, as well as other institutions peculiarly Dutch, which do not obtain in Ceylon ; so that the Roman-Dutch Law, as accepted in Ceylon re-approaches the civil law ; and, indeed, it will be found in the old treatises, as in Voet on the Pandects, that, when not controlled by some statute or custom, the Dutch commentator always relies on the civil law as his authority.
>
> The Roman-Dutch law, modified by statute, and the introduction of certain portions of English law and of modern equity, forms the law of the 'maritime provinces', and extends to every inhabitant of the island, except in those instances in which such inhabitant is by privilege under the sanction of another form of law in certain cases." (*vide* Institutes of the Laws of Ceylon by Thompson, Vol. II, pp. 11 and 12).

In *Weerasekera* v. *Peiris*, (1932) 34 N.L.R., at 285, Sir Lancelot Sanderson, in delivering the opinion of the Privy Council, cited with approval the dictum of Moncreiff, A.C.J., in *Karonchihamy* v. *Angohamy* (*vide* 8 N.L.R. 1) which is as follows : "The Common Law of Ceylon is the Roman-Dutch Law as it obtained in the Netherlands about the commencement of the last century."

It must not be assumed that Roman-Dutch Law applies in all matters governed by private law. The English law has made inroads into our legal system in several ways. Referring to the reception of English Law in South Africa, Hahlo

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and Kahn state as follows : (*vide* The British Commonwealth Series, The Development of its Laws and the Constitutions, Vol. 5, p. 18).

> "The process by which English doctrines and principles infiltrated into the law of the Cape resembles in many respects the reception of Roman Law on the Continent during the 15th and 16th centuries. Some English institutions marched into our law openly along the highway of legislative enactment, to the sound of brass bands of Royal Commissions and public discussion. Others slipped into it quietly and unobstrusively along side roads and by paths."

The same observations could be made of Ceylon. The English Law governing certain topics on Mercantile Law were bodily introduced into Ceylon by statute law. There are other statutes which are either replicas or close imitations of English Statutes. In interpreting these statutes, naturally, English decisions have to be resorted to.

A more subtle way in which English Law had gradually crept in is by tacit acceptance of English Law. What Sir John Wessels wrote regarding the Cape Province is equally true of Ceylon (*vide* 1920 S.A.L.R. 265). He says :—

> "Roman-Dutch Law has influenced the English Law far more than people think. Sometimes inroads have been open and overwhelming as when the English Law of Evidence was introduced by legislation, first at the Cape and afterwards throughout the whole of South Africa, and at other times English legal ideas have crept in insidiously as if it were almost by accident."

Thus the action for use and occupation is entirely English Law (*vide* Landlord and Tenant by Tambiah). The relief given to the lessee against forfeiture for non-payment of rent is based on English Law. In the law of property there are many instances where the English Law has found acceptance (*vide* Partitions in Ceylon by Jayawardena). The areas in which the English Law is applicable in Ceylon are fairly well known.

The Law of Delict in Ceylon is the Roman-Dutch Law. Although the English Law dealt with specific torts, under the Roman-Dutch Law delicts could be brought under two main categories : for patrimonial loss caused as a result of a negligent or intentional act the Aquilan action is available ; and for intentional and contumelious aggression against personal reputation or dignity of another person the *actio injuria* is the 'proper remedy. There are other actions such as the *actio de pauperie*, action *de pastu*, and actions under the Aediles edicts imposing liability on owners and occupiers of dangerous premises. The English doctrine of tort known as conversion found no place in our legal system.

The oft quoted dictum in *Dodwell & Co., Ltd.* v. *John et al*, (1918) 20 N.L.R. 206, does not support the proposition that the English Law of conversion is part of our law. What was held by the Privy Council in that case was that where a person receives money with notice of the nature of the trust affecting it, he was bound to account for it to the beneficiary. Although Lord Haldane observes (*vide* (1918) 20 N.L.R. 210) :

> "It may well be true that the principles of the English common law have been so far recognised in the jurisprudence of Ceylon as to admit of the same question being treated as one of conversion having taken place." This dictum was merely *oditer* and is not supported by authority.

In *Punchi Banda* v. *Ratnam*, (1944) 45 N.L.R. 198, it was held that the English Law of conversion was part of our law. But the ruling in *Thompson* v. *Mercantile Bank*, (1935) 15 Law Recorder 61, where it was held that the English doctrine of conversion is not part of our law, was not cited or considered. In *Punchi Banda* v. *Ratnam*, it was assumed that the English Law of conversion is applicable. The Roman-Dutch authorities were neither cited nor considered. The better view is that the English Law of conversion is not part of our law (*vide* The British Commonwealth Series, The Development of its Laws and Constitutions by Jennings and Tambiah, Vol. 7, page 251).

In South Africa also an attempt to introduce the English Law of conversion was made, but it was not successful. In *John Bell & Co.* v. *Esselen*, (1954) 1 S.A.L.R., 147 page 2, the Appellate Division of the Supreme Court of South Africa reiterated the view that, as far as the doctrine of conversion is concerned, it is sufficient to say that the doctrine is unknown to the Roman-Dutch Law.

For any principle of English law to be tacitly accepted in Ceylon, there should be a long line of decisions adopting it. For the reasons set out, I hold that the English doctrine of conversion was never tacitly adopted in Ceylon and is not part of our Common Law.

The only question that remains to be considered is whether by statutory provision the English doctrine of conversion has been applied

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to Bills of Exchange. The Civil Law Ordinance, (Cap. 79) enacts that the law of England should be observed in Ceylon in certain maritime and commercial matters. Section 3 of the Ordinance, enacts that in all questions or issues which may have to be decided in Ceylon with respect to the Law of Banks and Banking, etc., shall be the same as is administered in England in the like case at the corresponding period if such question at issue had to be decided in England unless there is some contrary statutory provision in force in Ceylon.

In English Law the liability of the Banker with regard to the collection of cheques is founded on the common law doctrine of conversion which consists of any dealing with goods in a manner inconsistent with the right of the true owner provided that it was also established that there was no intention on the part of the defendant in so doing to deny the owner's right or to assert a right which was inconsistent with the owner's right. Therefore, under the English Law, any person who, however innocently, obtains possession of the goods of a person who has been fradulently deprived of them, and disposes of them whether for his own benefit or that of any other person is guilty of conversion (*vide Hollins* v. *Fowler*, (1875) L.R. 7, H.L. 575, at 591). The Roman-Dutch law on this matter differs fundamentally from the English law.

The introduction of English Law on Banking did not let in principles of English law governing mortgages and pledges of movables to a Bank. Thus in *Krishnapillai* v. *Hong Kong and Shanghai Bank Corporation*, (1932) 33 N.L.R. 249, the question arose as to whether the doctrine of parate execution, which gave the right to an English Bank to sell shares pledged to it without recourse to the Courts of law, is part of the law of Ceylon. It was contended that the Civil Law Ordinance introduced the English Law of Banking in Ceylon and, therefore, the principles of English law governing pledges of movables form part of the law of Ceylon. This contention was rejected by the Supreme Court. It was held that the common law of the land does not give place in the matter of rights of mortgage and pledge to the English Law when the mortgagee or pledgee is a Bank. This ruling was followed in *Mitchell* v. *Fernando*, (1945) 46 N.L.R. 265.

In this connection the case of *Kulatilleke* v. *Bank of Ceylon*, (1957) 59 N.L.R. 189, should be considered. In that case it was also held that the drawer of a cheque marked "Not Negotiable", the amount of which was subsequently altered by a third party, was entitled to recover from the collecting banker the amount by which the cheque was so fraudulently altered and that in such a case the collecting banker cannot claim the benefit of section 82 of the Bills of Exchange Ordinance. Basnayake, C.J., in a short judgment, said : "As our law on the subject of a bankers liability is the same as in England, (section 3 of the Civil Law Ordinance), except where special provision has been made in our law, the defendant would be liable to pay to the plaintiff the amount that has been paid to the defendant by his bank without his authority". It is submitted that the liability of the banker depended on the doctrine of conversion which is not part of our law and this aspect was not considered by the Court in that case.

Another reason given in that case is that section 82 of the Bills of Exchange Ordinance applies to cheques which do not have a taint of forgery or fraudulent alteration, and, therefore, a cheque, which is a drawer's cheque in all respects and which carries the authority of the drawer and which has been altered fraudulently is invalid. An altered cheque still remains a cheque and attaches to itself the benefit of section 82 of the Bills of Exchange Ordinance. I regret I am unable to agree with the reason given in the case of *Kulatilleke* v. *Bank of Ceylon* (*ibid.*). Despite section 3 of the Civil Law Ordinance the common law of Ceylon on delict remains unaltered.

The next question for consideration is whether section 82 of the Bills of Exchange Ordinance, (Cap. 82) impliedly introduced the English Law of conversion into Ceylon. It may be urged that if the English doctrine of conversion is not part of our law, section 82 of the Ceylon Bills of Exchange Ordinance is superfluous. Section 82 of the Ceylon Bills of Exchange Ordinance is an exact replica of section 82 of the English Act. In South Africa it was reproduced as section 80 of the South African Bills of Exchange Act. In South Africa the question arose whether this provision altered the common law of South Africa. In *Yorkshire Insurance Co.* v. *Standard Bank*, (1928) W.L.D. 251, at 278, 280, Tindall, J., said :

"If I do not misunderstand the English common law the collecting banker is liable, not by reason of any duty he owes to the true owner, but on the doctrine that it is guilty of a conversion . . . But it is well settled now that no such doctrine obtains in Roman-Dutch Law . . . It is vital to bear in mind this difference in the two

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systems of law in considering the interpretation of section 80 of the Bills of Exchange Proclamation . . . Seeing that in our law, the collecting Banker is not liable on the ground of conversion, the only ground on which the collecting banker who receives payment in good faith could possibly be held liable is that he owed a duty to the true owner and was negligent . . . The frame of section 80 is clearly not that of a section designed to impose a liability where none existed before but to afford a protection . . . The result of my interpretation may be to make section 80 superfluous ; but provisions in statutes sometimes are of that character. The whole statute was copied almost verbatim from the English Act probably without considering what the effect of a specific provision would be, having regard to the differences in the common law of two countries."

In view of the fact that the English doctrine of conversion is not part of our law, the same observations would apply to the provisions of section 82 of the Ceylon Bills of Exchange Ordinance. In South Africa as a result of the ruling in *Yorkshire Insurance Co.* v. *Standard Bank*, the law was amended.

Finally it was contended that section 98 (2) of the Bills of Exchange Ordinance introduced the English Law of Conversion so far as it applies to cheques. This section enacts :

"The rules of the Common Law of England including the Law Merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques."

This provision was intended to bring the substantive law of bills of exchange, promissory notes and cheques and was not intended to affect the consequences and the rights and liabilities of persons under the general law of the land when a bank enters into transactions.

Section 10 of the Canadian Bills of Exchange legislation is very similar to section 98 (2) of the Ceylon Bills of Exchange Ordinance. The question arose whether section 10 of the Canadian Bills of Exchange Act introduced the doctrine of conversion in Canada. In dealing with this aspect Falconbridge in his "Banking and Bills of Exchange in Canada" (6th Edition) says :

"The result would appear to be that notwithstanding section 10 of the Bills of Exchange Act, which purports to make the common law of England applicable to bills, notes and cheques, in cases not expressly provided for by the statute itself, effect is given to this provision in Canada only within the limits of what may be called the law of bills and notes, but not including all the consequences of or all the rights or liabilities resulting from the contracts entered into by parties to bills or notes."

The same observation applies to Ceylon. Merely because a cheque is the subject-matter of the conversion, the English law of conversion has not been introduced into Ceylon. (Compare *Norwich Union Fire Insurance Society, Ltd.* v. *Banque Canadienne Nationale*, (1934) 4 Dominion Law Reports 223, where the Supreme Court of Canada held that the English doctrine of conversion was not in force in the Province of Quebec).

Where a cheque is forged and the money obtained by using it, the remedy available under the Roman-Dutch law has to be found within the four corners of the Roman-Dutch Law. In *Leal & Co.* v. *Williams*, (1906) T.S. 554, Innes, C.J., after citing Voet, 6.1.10, said : "The remedy, therefore, our law gives to the owner of stolen property is this : he may follow the property and vindicate it, anywhere, provided it is still *in esse*. And he may bring an action *ad exhibendum* to recover the property or its value (should it have been sold or consumed) against the thief or heirs or against any person, who has received it with knowledge of the tainted title. But the fact that these are the only remedies allowed by our law is inconsistent with the doctrine of conversion, which allows an owner to sue a *bona fide* intermediary who obtained the stolen property and parted with it again." It may be that the Aquilian action would also be available if negligence or intentional wrong doing could be shown on the part of the person who is made liable in such cases. The Roman-Dutch Law always attaches liability on a fault basis. This is a matter where legislation is very necessary to amend the Bills of Exchange Ordinance in the interests of commerce. The Courts of law can only interpret the provisions of law as they exist and cannot usurp the functions of the legislature.

Legislation on the lines of those enacted in South Africa would be necessary in Ceylon to protect commerce. (*vide* Allison and Kahn, pages 582-583 and 726).

For the reasons set out I am of the view that the plaint does not disclose a cause of action. Even if it is based on an action for use of money had and received, as contended by counsel for the respondent, it cannot succeed for the reason that

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such an action is unknown to our law. In the present action even the Roman-Dutch principle against undue enrichment cannot be invoked since enrichment is not available. The defendant has paid valuable consideration for the cheques. He has parted with a radio set and also given the balance sum to Aboosali. Therefore, he would not be liable even if an action for undue enrichment was brought against him.

For the reasons set out the plaintiff's action is dismissed with costs in both Courts.

Appeal allowed.

Present : **Sansoni, J., and Sinnetamby, J.**

PERERA & ANOTHER *vs.* DAYAWATHIE

S.C. 87-88 (*Crim.*), 1960—*D.C. Colombo*, 7059/*PN.*
Argued and decided on : 20th February, 1962.

Partition Act, (*Cap.* 69), *section* 53 (1) (*b*)—*Obstruction to Surveyor commissioned to partition land—Contempt of Court—Can an instigator not present on land be found guilty ?*

Held : That a person who, without being present on the land at the time, instigates another to obstruct a surveyor acting on a commission issued by Court to partition a land, cannot be found guilty of contempt of Court under section 53 (1) (*b*) of the Partition Act.

G. E. Chitty, Q.C., with *Neville Wijeratne,* for the respondents-appellants.

No appearance for the plaintiff-respondent.

S. Pasupati, Crown Counsel, as *amicus curiae.*

SANSONI, J.

Upon a commission issued by the District Judge to a surveyor to partition the land dealt with by the interlocutory decree entered in this partition action, the surveyor went to the land in order to carry out his commission. He was prevented from entering the land by the appellant, Premadasa. The appellant, Victor Perera, who claims to be entitled to a portion of this land, admittedly instigated Premadasa to obstruct but he was not present on the land and, therefore, he cannot be said to have done anything himself to prevent the execution of the commission.

After inquiry, the District Judge found both appellants guilty of contempt of Court under section 53 (1) (*b*) of the Partition Act, Cap. 69, and fined each of them Rs. 250/- in default six weeks' rigorous imprisonment. We do not think there can be any doubt that the appellant, Victor Perera, who was not even present at the scene cannot be found guilty, however reprehensible his conduct was in setting up Premadasa to obstruct.. The conviction in his case must, therefore, be set aside. But with regard to Premadasa, who was well aware that this land was subject-matter of this action and that the surveyor had come in order to execute a commission issued by the Court, we think that the contempt had been clearly made out. It was no answer for him to say that he was asked by Victor Perera to obstruct the surveyor. His duty was to allow the commission to be executed, and if Perera had any right to this land that could have been placed before the Court in proper form. It is not denied on the facts that there was an obstruction of the surveyor and the conviction in his case was clearly right. His appeal is, therefore, dismissed.

SINNETAMBY, J.

I agree.

Appeal of 1st appellant dismissed.

Appeal of 2nd appellant allowed.

* For Sinhala translation, see Sinhala section, Vol. 10 part 2, p 5.

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Present : **Alles, J.**

VELLASAMY *vs.* N. Q. DIAS & ANOTHER*

Application for an Injunction on N. Q. Dias, Permanent Secretary, Ministry of Defence and External Affairs.
S.C. No. 30/1965.

Argued and decided on : 1st March, 1965.

Courts Ordinance, (Cap. 6), section 20—Application for Injunction praying for order on respondents to refrain from removing petitioner from Ceylon pending institution of proposed action in District Court against refusal to grant a valid " residence visa "—What the Court has to consider.

The petitioner prayed for an Injunction under section 20 of the Courts Ordinance ordering and directing the respondents to refrain from removing him from Ceylon pending the determination of an action which he proposed to institute in the District Court against them and of which he had given notice under section 461 of the Civil Procedure Code.

He also averred—

(*a*) that the 2nd respondent who is the Controller of Immigration and Emigration " acting wrongfully and unlawfully and in excess and/or abuse of his powers has refused to grant him a valid residence visa " ;

(*b*) that irremediable mischief might be caused to him if he were removed before he could bring the proposed action in the District Court.

The second respondent in his affidavit stated that he refused to grant the petitioner a residence visa in the *bona fide* exercise of the discretion vested in him.

Held : (1) That the petitioner was not entitled to the injunction asked for, as he failed to establish that irremediable mischief would be caused to him by his removal from Ceylon and that any cause of action had accrued to him to sue the respondents in the contemplated action.

(2) That in the present application, the Court must be satisfied not only that irremediable mischief would be caused to the petitioner by his removal but also that he had a valid cause of action against the respondents.

Case referred to : *Mahamado* v. *Ibrahim,* (1895) 2 N.L.R. 36.

M. Tiruchelvam, Q.C., with *Nihal Jayawickrema* and *M. Radhakrishnan,* for the petitioner.

H. L. de Silva, Crown Counsel, for the respondents.

ALLES, J.

This is an application for an Injunction ordering and directing the respondents to refrain from removing the petitioner from Ceylon pending the determination of an action which the petitioner proposes to institute in the District Court.

The petitioner was arrested on the 16th of October, 1964, for overstaying his residence in Ceylon and, on representations made by him, he was released on payment of the Visa Taxes for a period up to and including the 7th of July, 1965. The present petition to this Court was made under section 20 of the Courts Ordinance praying for an Injunction from this Court on the ground that irremediable mischief might be caused to the petitioner before he could bring his action in the original Court.

The principles on which an Injunction would be granted from this Court has been laid down by Bonser, C.J., in *Mohamado* v. *Ibrahim* reported in 2 N.L.R. 36. Bonser, C.J., said : " the power of granting Injunctions is a strictly limited one to be exercised only on special grounds, and in special circumstances : (1) where irremediable mischief would ensue from the act sought to be restrained ; (2) an action would lie for an injunction in some Court of original jurisdiction ; and (3) the plaintiff is prevented by some substantial cause from applying to that Court. "

* For Sinhala translation, see Sinhala section, Vol. 10 part 2, p. 6.

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In his petition, the petitioner has stated that the 2nd respondent, who is the Controller of Immigration and Emigration, " acting wrongfully and unlawfully and in excess and or abuse of his powers has refused to grant the petitioner a valid residence visa. " To this averment the 2nd respondent has stated that " in the *bona fide* exercise of the discretion vested in him he refused to grant the petitioner a residence visa authorising him to stay in Ceylon, as it was contrary to the policy of the Government to do so in the circumstances of this case. "

Counsel for the Crown submits that the averments in paragraph 9 of the petition are averments of law and that there is no material on which the petitioner has alleged that the 2nd respondent acted wrongfully and unlawfully and in excess of his powers. There is further no evidence that any irremediable mischief will be caused to the petitioner by his removal from Ceylon. The material, therefore, on which the petitioner seeks an Injunction from this Court has not been established to my satisfaction. In view of the averments in paragraph 9 of the petition, it would appear that no cause of action has accrued to the petitioner to institute proceedings against the respondents. Further, the petitioner has given notice under section 461 of the Civil Procedure Code that he proposes to institute proceedings against the 2nd respondent praying— " (*a*) for a mandatory order directing the 1st respondent to grant the petitioner a valid residence visa till 7th July, 1965. " This is a prayer which the Court cannot grant. Under section 14 of the Immigrants and Emigrants Act, it is only the Controller of Immigration and Emigration who has the right to hear and determine such an application. The petitioner in his petition avers that there was a statutory duty owed to him by the 2nd respondent. If that was so, his proper remedy would have been by way of a Writ of Mandamus.

Mr. Tiruchelvam for the petitioner submits that it is not open to this Court to consider the facts in respect of which this application is made. His contention is that this is a matter that has to be considered in the original Court in appropriate proceedings. I am unable to agree. For the purposes of the present application I must be satisfied that irremediable mischief will be caused to the petitioner by his removal from the Island and further that he has a valid cause of action against the respondents. On both matters there is a complete absence of evidence and consequently the application must fail.

At the conclusion of the argument, Counsel for the petitioner applied to withdraw this application because it was brought to Counsel's notice that the petitioner had succeeded in obtaining an interim injunction from the District Court. Counsel was not able to enlighten me whether the District Court had been apprised of the fact that at the same time an application in respect of the same matter was made to this Court.

Counsel for the Crown, however, invited me to consider the present application on its merits. In my view the petitioner has not satisfied this Court on the material placed before me that he is entitled to succeed. The application is, therefore, refused with costs.

Application refused.

Present : **Sri Skanda Rajah, J.**

A. L. PEDRIS *alias* DAVID *vs.* R. A. TENNAKOON (P.C. 2311)*

S.C. No. 1424/'64—*M.C. Hambantota, No.* 43875 (*holden at Tissamaharama*).

Argued and decided on : 2nd July, 1965.

Penal Code, section 419—*Charge of mischief by fire—Human dwelling house.*

Held : That a hut erected in the morning and burnt down at 2.00 p.m. on the same day could not be said to be one ordinarily used as a human dwelling within the meaning of section 419 of the Penal Code.

N. Senanayake, for the 1st accused-appellant.

A. N. Ratnayake, Crown Counsel, for the Attorney-General.

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* For Sinhala translation, see Sinhala section, Vol. 10 part 2, p. 8.

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SRI SKANDA RAJAH, J.

The complainant had told the Police that Karunaratne, the 2nd accused, had been allotted this land ; but still the complainant had gone and erected a hut on this land. It is fantastic to say that he erected a hut at a cost of Rs. 475/-. The Inspector had said that the damage caused was only Rs. 50/-.

The complainant was courting trouble when he went and erected this hut. The complainant erected this hut that morning and it was burnt down at 2 p.m. that day. It cannot, therefore, be said that it was ordinarily used as a human dwelling. Therefore, the charge under section 419 of the Penal Code fails.

I set aside the conviction and acquit the 1st accused.

Accused acquitted.

Present : **Abeyesundere, J., and Alles, J.**

E. M. E. SARAM *vs.* E. M. R. SARAM & OTHERS

S.C. 259/1962—*D.C.* (*F*) *Gampaha, No.* 8173/*P.*

Argued and decided on : 10th March, 1965

Partition action—Whether two partition actions can be pending in respect of the same land at the same time.

Held : (1) That the institution of an action for the partition of a land does not prevent another action from being instituted to partition the same land, so long as the termination of the common ownership is not *res judicata.*

(2) That in any event in the present case, the two lands in respect of which the two actions had been filed, did not appear to be the same.

(3) That, however, the learned trial Judge was right in dismissing the plaintiff's action on the ground that the 11th to 17th defendants had acquired prescriptive title to the land.

Cases referred to : *Annamalay Chetty* v. *Thornhill,* (1931) 33 N.L.R. 41 ; 11 C.L. Rec. 87.
Appuhamy v. *Mudiyanse,* (1937) 39 N.L.R. 221 ; 2 C.L.J. 23.

N. S. A. Goonetilleke, for the plaintiff-appellant.

C. D. S. Siriwardene, for the 11th to 17th defendants-respondents.

ABEYSUNDERE, J.

This action, No. 8173, was instituted in the District Court of Gampaha for partition of the land called Delgahawatte depicted as lots A and B on the plan marked " X ". The learned District Judge who tried the action dismissed it on two grounds. The first ground is that another action was instituted in 1918 in the District Court of Colombo to partition the land to which this appeal relates and that, therefore, the present action in the District Court of Gampaha cannot be maintained. The second ground is that the plaintiff has no title to the said land as the 11th to 17th defendants have acquired title to the entirety of the said land and they have prayed for the dismissal of the action to partition the said land. The plaintiff has appealed from the judgment and decree of the learned District Judge.

The first ground mentioned above does not, in my view, justify the dismissal of the action. I am of the view that an action instituted for the partition of a land does not prevent another action being instituted to partition the same land so long as the termination of common ownership is not *res judicata.* I take this view having regard to the view of this Court in the case of *Appuhamy* v. *Mudiyanse,* 39 N.L.R. 221, and of the Privy Council in *Annamalay Chetty* v. *Thornhill,* 33 N.L.R. 41, that the fact that an action in respect of any cause of action is pending is no bar to the institution of another action in respect of that cause of action. Besides, the land in respect of which an action was instituted in 1918 in the District Court of Colombo does not appear to be the same as the land to which the present action in the District Court of Gampaha relates as Northern, Eastern, and Southern boundaries of the land to which the first action relates are different from the Northern, Eastern, and Southern boundaries of the land to which the second action relates, and also there is a difference in the extents.

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The second ground mentioned above, however, justifies the dismissal of the action. I do not see any reason to interfere with the findings of the learned District Judge that the 11th to 17th defendants have acquired prescriptive title to the entirety of the land to which this appeal relates and that the plaintiff has no title to any part of that land. The 11th to 17th defendants have prayed for the dismissal of the plaintiff's action. They, therefore, do not want the said land to be partitioned.

I dismiss the appeal with costs.

ALLES, J.

I agree.

Appeal dismissed.

Present : **T. S. Fernando, J., and Sri Skanda Rajah, J.**

ROMANIS & OTHERS *vs.* SIVETH APPU & ANOTHER

S.C. No. 5/'63—*D.C. (F) Avissawella, No.* 8323/*L.*

Argued and decided on : 10th February, 1964.

Prescription Ordinance, section 3—*Possession—Nature of evidence required to prove " possession ".*

Held : That vague evidence without details, that people " possessed " a land is insufficient to satisfy a Court that there was possession within the meaning of section 3 of the Prescription Ordinance.

N. R. M. Daluwatte, for the plaintiffs-appellants.
No appearance for the defendants-respondents.

T. S. FERNANDO, J.

In this action filed for the purpose of obtaining a declaration of title to a certain allotment of land and ejectment of the defendants therefrom, paper title based on a partition decree has been found by the learned District Judge to be in the plaintiffs. Although the Judge reached this finding, he held that the defendants had acquired title thereto by prescription and, accordingly, dismissed the action.

Having dealt with the evidence of possession of the plaintiffs, the learned District Judge in the last paragraph of his judgment states as follows :—

> " The evidence of the 1st defendant and his witnesses is more convincing than the evidence led on behalf of the plaintiffs with regard to possession. I accept the evidence of the 1st defendant and his witnesses with regard to the plantation and possession by Punchi Singho and the defendants."

There is no analysis of the nature of the possession by Punchi Singho and the defendants. It would appear that the only plantation that exists on this land, which is largely in jungle, is limited to two coconut trees and three or four old rubber trees. There is no evidence of any actual tapping of the rubber trees for latex or of the obtaining of rubber coupons by Punchi Singho and the defendants at any time. In regard to the coconut trees, no witness stated that the produce of the two trees was taken by Punchi Singho or the defendants. It has been held by this Court in more than one case that vague evidence without details that people " possessed " a land is insufficient to satisfy a Court that there was possession for the purpose of satisfying the provisions of the Prescription Ordinance. The onus of proving that, notwithstanding the title of the plaintiffs, there was undisturbed and uninterrupted possession of the land by the defendants, independent of the plaintiffs' title, was on the defendants, and we are quite unable to say that in this case that onus has been discharged by them. In the result the plaintiffs, in our opinion, were entitled to judgment in their favour.

Counsel for the plaintiffs-appellants points out to us that, although the learned District Judge has held that the title to this land is in the plaintiffs, the latter have established their title only to a half-share of the land. It would appear that what passed to the plaintiffs was the title of only one of the two children of the original owner, Mathohamy. They became entitled, therefore, only to an undivided half-share of the land specified in the schedule to the plaint. In view of that concession which has been made very fairly by learned Counsel for the plaintiffs, the defendants not being represented on this appeal, we direct that the decree appealed from be set aside and the plaintiffs be declared entitled to an undivided half-share of the land which was the subject-matter of the dispute between the parties and to ejectment of the 1st and 2nd defendants therefrom.

The plaintiffs will be entitled to the costs in the District Court as well as the costs of this appeal.

SRI SKANDA RAJAH, J.

I agree.

Set aside.

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ELECTION PETITION, *No.* 21 *OF* 1965—*BALANGODA.*

Present : **Sri Skanda Rajah, J.**

SATTAMBIRALALAGE DON PIYASENA *vs.* CLIFFORD SENAKA RATWATTE

Argued on : July 19th and 20th, 1965.
Decided on : July 27th, 1965.

Ceylon (Parliamentary Elections) Order-in-Council of 1946—*Petition for declaring election void—Three charges of corrupt practice and a further paragraph relating to prevalence of such misconduct and/or other circumstances at the election within the meaning of Article* 77 (*a*) *that majority of electors were or may have been prevented from electing the candidate whom they preferred—Whether more than four charges contained in petition.*

Parliamentary Election Rules, 1946, *Rule* 12 (2) *and* (3)—*Deposit of security in two instalments within prescribed time—Whether permissible—Adequacy of security—Number of charges—Motion for dismissal of petition for insufficiency of security.*

The petitioner prayed that the election of the respondent be declared void on three grounds of corrupt practices, viz. :—

(*a*) false statements made in relation to the personal character of the rival candidate ;
(*b*) treating ;
(*c*) undue influence.

An additional charge was set out in paragraph 6 of the petition as follows :—

" Your petitioner further states that such misconduct and/or other circumstances prevailed at the said election within the meaning of section 77 (*a*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, that the majority of electors were or may have been prevented from electing the candidate whom they preferred."

On the date of filing the petition, viz., 17th April, 1965, a sum of Rs. 5,000/- was deposited as security as required by Rule 12 of the Parliamentary Election Petition Rules, 1946. A further sum of Rs. 2,000/- was deposited as security on 19th April, 1965.

The respondent moved under Rule 12 (3) for an order directing the dismissal of the petition and for costs on the following grounds :—

(*a*) The security is insufficient as the petition contains more than four charges ;
(*b*) The security should have been given by making only one deposit and not two.

It was contended on behalf of the petitioner—

(1) that there were only three charges in the petition as the word " charges " in Rule 12 (2) is confined only to corrupt and illegal practices and did not apply to the grounds mentioned in Article 77 (*a*), (*b*), (*d*), and (*e*), therefore, Rs. 5,000/- deposited was sufficient security. The second deposit of Rs. 2,000/- was made out of abundance of caution.;

(2) that at the worst, there were only four charges. Therefore, Rs. 7,000/- was adequate security ;

(3) that even if there were more than four charges, the petition should not be dismissed as Rule 12 (3) does not provide for dismissal, but the Court would delete the words " other circumstances " and allow the petitioner to proceed.

Held : (1) That the obligation to dismiss the petition is implicit in Rule 12 (3), which gives the respondent the right to apply for its dismissal.

(2) That there is no provision restricting the security to only one deposit, provided it is done within the three days prescribed in Rule 12 (1).

(3) That there were four charges set out in the petition and the security deposited was therefore adequate. Paragraph six of the petition which referred to Article 77 (*a*) contained one charge.

(4) That the definition of " charges " in *Tillekewardene* v. *Obeyesekera,* (1931) 33 N.L.R. 65, is not exhaustive.

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Cases referred to : *Silva* v. *Karalliadda*, (1931) 33 N.L.R. 85 ; I C.L.W. 19
Jeelin Silva v. *Kularatne*, (1942) 44 N.L.R. 21 ; XXIV C.L.W. 1
Tillekewardene v. *Obeyesekera*, (1931) 33 N.L.R. 65 ; I C.L.W. 12
Perera v. *Jayewardene*, (1947) 49 N.L.R. 1 ; XXXV C.L.W. 105
Mohamed Mihular v. *Nalliah*, (1944) 45 N.L.R. 251 ; XXVII C.L.W. 63
Ilangaratne v. *G. E. de Silva*, (1948) 49 N.L.R. 169 ; XXXVI C.L.W. 97
Vinayagamoorthy v. *Ponnambalam*, (1936) 40 N.L.R. 178 ; VII C.L.W. 21.

A. H. C. de Silva, Q.C., with *Izzadeen Mohamed* and *S. C. Crossette-Tambiah*, for the petitioner.

G. T. Samarawickrema with *Felix R. Dias Bandaranaike* and *(Mrs.) Luxmi Dias Bandaranaike*, for the respondent.

H. L. de Silva, Crown Counsel, as *amicus curiae*.

SRI SKANDA RAJAH, J.

The petitioner seeks to have the election of the respondent declared void on the grounds set out in paragraphs 3 to 6 of the petition. Paragraphs 3, 4 and 5 allege three different kinds of corrupt practice, viz., false statements made in relation to the personal character of the rival candidate, treating and undue influence. The subject of this inquiry is based on the allegation in paragraph 6 which is as follows :

" Your Petitioner further states that such misconduct and/or other circumstances prevailed at the said election within the meaning of section 77 (*a*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, that the majority of electors were or may have been prevented from electing the candidate whom they preferred."

Article 77 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, reads :

" The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely :—

(*a*) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred ;

(*b*) noncompliance with the provisions of this Order relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election ;

(*c*) that a corrupt practice or illegal practice was committed in connexion with the election by the candidate or with his knowledge or consent or by any agent of the candidate ;

(*d*) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been found guilty of a corrupt practice by a District Court or by the report of an Election Judge ;

(*e*) that the candidate was at the time of his election a person disqualified for election as a Member."

It may be mentioned that this provision is in identical terms as Article 74 of the Ceylon (State Council Elections) Order-in-Council, 1931.

It is necessary to reproduce Rule 12 of the Parliamentary Election Petition Rules, 1946, which is as follows :

" (1) At the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, charges, and expenses that may become payable by the petitioner shall be given on behalf of the petitioner.

(2) The security shall be to an amount of not less than five thousand rupees. If the number of charges in any petition shall exceed three, additional security to an amount of two thousand rupees shall be given in respect of each charge in excess of the first three. The security required by this rule shall be given by a deposit of money.

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(3) If security as in this rule provided is not given by the petitioner, no further proceedings shall be had on the petition, and the respondent may apply to the Judge for an order directing the dismissal of the petition and for the payment of the respondent's costs. The costs of hearing and deciding such application shall be paid as ordered by the Judge, and in default of such order shall form part of the general costs of the petition."

This is a reproduction of Rule 12 of the Ceylon (State Council) Petition Rules, 1931, except for the variations that : (1) in the present Rule 12 (2) security shall be given only by a deposit of money ; and (2) in the present Rule 12 (3) provision is made regarding the costs in respect of hearing and deciding applications under it.

Article 74 of the Ceylon (State Council Elections) Order-in-Council, 1931, and the old Rule 12 have been the subject of interpretation by this Court. Those cases will be referred to in this order. So will those cases dealing with the corresponding new provisions.

This petition was filed on 17th April, 1965, on which date a sum of Rs. 5,000/- was deposited as security. On 19th April, 1965, a further sum of Rs. 2,000/- was deposited as security.

The respondent has applied under Rule 12 (3) for an order directing the dismissal of the petition and for costs. He contends :

(1) The security is insufficient as the petition contains more than four charges ;

(2) The security should have been given by making only one deposit and not two as in this instance.

The petitioner, on the other hand, submits :

(1) There are only three charges. Therefore, Rs. 5,000/- is sufficient as security. The further deposit of Rs. 2,000/- was made out of abundance of caution ;

(2) At the worst there are only four charges. Therefore, Rs. 7,000/- is adequate security ;

(3) Even if there are more than four charges, this Court is not obliged to dismiss the petition because Rule 12 (3) does not expressly provide for dismissal, but would delete the words " other circumstances " which are contained in paragraph 6.

It seems convenient to dispose of the petitioner's third submission first. The obligation to dismiss the petition is implicit in Rule 12 (3), which gives the respondent the right to apply for its dismissal. In *Silva* v. *Karalliadda*, (1931) 33 N.L.R. 85, Drieberg, J., said : " The security required by Rule 12 (2) has to be given at the time of the presentation of the petition or within three days after, and if not so given the Rule 12 (3) provides that no further proceedings shall be had on the petition and that the respondent may move for an order directing its dismissal and payment of the respondent's costs. This provision is imperative and on this ground alone the petition should be dismissed ; Rules 19 to 21 do not apply to a case where the petitioner has not furnished security to the right amount. "

In *Jeelin Silva* v. *Kularatne*, (1942) 44 N.L.R. 21, at 22, Hearne, J., said : " It was further argued that even if the security was insufficient the petition would not be dismissed on this ground alone by reason of the provisions of Rules 19-21. It has been held by this Court that these rules have no application in cases where the petitioner has not furnished security to the right amount. "

Be it noted that provisions corresponding to the old Rules 19-21, which gave some limited relief to the petitioner, have been altogether omitted. Therefore, this submission fails.

The respondent's second objection may now be disposed of. It was submitted that to allow the security to be deposited by more than one deposit may even result in 7,000 deposits of one rupee each being made. That would result in embarrassment to the Registrar of this Court. The Registrar may, perhaps, be thankful to the respondent for his solicitous concern for the Registrar's comfort. To uphold this objection is to put an undue strain on the language of this provision. If it was the intention to restrict the security to only one deposit it would have been so stated. I would reject the second objection.

The petitioner's first submission is based on the following dictum of Drieberg, J., in *Tillekewardene* v. *Obeyesekera*, (1931) 33 N.L.R. 65, at 67 : " In my opinion by the word ' charges ' in Rule 12 (2) is meant the various forms of mis-

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conduct coming under the description of corrupt and illegal practices ; for example, whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery."

In *Tillekewardene* v. *Obeyesekera* (*supra*) only three offences, viz., bribery, treating and contracting for the payment for conveyance of voters (*i.e.*, two charges of corrupt practice and one of illegal practice) were alleged. But in answer to an application for particulars, the petitioner stated 17 instances or cases of bribery, 26 of treating and, at least, 14 cases of payments or contracts for conveyance of voters. The *ratio decidendi* is that the word "charge" in Rule 12 (2) may be applied to the offence stated in the petition and also to each act constituting the offence.

This dictum was adopted by the Divisional Bench in *Perera* v. *Jayewardene*, (1947) 49 N.L.R. 1, where, too, only three offences were alleged in the petition, viz. :

(1) Printing, publishing and distributing handbills which did not bear names and addresses of the printers and publishers ;

(2) publishing false statements of fact in relation to the personal character of the rival candidate ; and

(3) undue influence, only the last two being corrupt practices.

Based on this dictum it was argued that the word "charges" in Rule 12 (2) is confined only to corrupt and illegal practices and will, therefore, apply only to the grounds mentioned in Article 77 (*c*) and not to the grounds which fall under the other heads, viz., Article 77 (*a*), (*b*) (*d*), and (*e*).

This submission would be correct only if the definition of "charges" given by Drieberg, J., is exhaustive as pointed out by Crown Counsel. As indicated earlier in *Tillekewardene* v. *Obeyesekera* (*supra*), Drieberg, J., was dealing with two charges of corrupt practice and one of illegal practice, and not with any of the other grounds in Article 74 (now 77).

But in *Perera* v. *Jayewardene* (*supra*), though the Divisional Bench adopted the dictum, the first charge, which was neither an illegal practice nor a corrupt practice, was regarded by the Court as a "charge" when it posed the question at page 6, "Does then the petitioner's petition disclose only three charges or does it disclose more than three charges ?" and held that it disclosed only three charges.

In *Mohamed Mihular* v. *Nalliah*, (1944) 45 N.L.R. 251, the grounds were only three, one alone being a corrupt practice, viz., bribery, the other two being neither corrupt practice nor illegal practice but falling under Article 74 (*b*) (now 77 (*b*)). Hearne, J., regarded them as three charges.

In *Ilangaratne* v. *G. E. de Silva*, (1948) 49 N.L.R. 169, the following grounds :

(1) "Your petitioner further states that by reason of circumstances attending on or following recent floods in the District including the disorganisation of the life of large sections of the voters, the segregation of refugees who were voters, disturbance of communication and the scarcity of petrol, the majority of the electors were or may have been prevented from electing the candidate whom they preferred at the said election."

(2) "Your petitioner further states that the respondent was at the time of the election a person disqualified for nomination and/or election as a member . . ."—

a ground falling under head (*e*) of Article 77—were regarded by Windham, J., as two charges. The first of these would fall under head (*a*) of Article 77 in the category of "other circumstances".

I would, therefore, hold that the definition of "charges" in *Tillekewardene* v. *Obeyesekera* (*supra*) is not exhaustive. I would further hold that there are more than three charges in this petition the first three charges being contained in paragraphs 3, 4 and 5 of the petition.

The question which remains is : Does paragraph 6 contain only one charge, as submitted by the petitioner, or more than one charge, as contended by the respondent ?

In *Vinayagamoorthy* v. *Ponnambalam*, (1936) 40 N.L.R. 178, at 185, Maartensz, J., said, "The charges in an election petition need not be formulated with the precision and exactness of a charge in criminal proceedings. The petitioner

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must state the facts and ground on which the petitioner relies to sustain the prayer of his petition."

Crown Counsel suggested that as regards Article 77 (*a*) two views were possible, viz., (1) to regard each reason enumerated therein (*e.g.*, general bribery) as a separate charge, as was done by Drieberg, J., in *Silva* v. *Karalliadda* (*supra*); or (2) to regard all the reasons enumerated therein (including other misconduct or other circumstances) as facts constituting one charge as was done by Hearne, J., in *Jeelin Silva* v. *Kularatne* (*supra*).

In *Silva* v. *Karalliadda* (*supra*), Drieberg, J., in an *obiter* said, "In my opinion the charges of general bribery, general treating, and general intimidation (falling under head (*a*) of Article 77) were distinct charges from those of bribery, treating and undue influence in regard to ascertained and named persons . . .".

In *Jeelin Silva* v. *Kularatne* (*supra*), the petition contained charges of undue influence, treating and impersonation. It was also prayed that the election be declared void "by reason of general intimidation and impersonation on a large scale", under Article 74 (*a*) (now 77 (*a*)). Hearne, J., regarded the last allegation as constituting the fourth charge. At page 22 he said, "The only question is how many charges did the petition contain? The answer, as a matter of simple calculation, is four."

This view of Hearne, J., though it may be *obiter* as submitted by the respondent, appeals to this Court as the better one. I would, therefore, respectfully adopt it. In the result, I hold that this petition contains four charges and that, therefore, the sum of Rs. 7,000/- is the right amount of security.

For these reasons, the motion is dismissed with costs.

Application refused.

Present: **Sri Skanda Rajah, J.**

PERERA, S.I. POLICE *vs.* ZULAIHA

Revision in M.C. Colombo, Case No. 18682/*C.*—(*APN*/*GEN*/23/65).

Argued and decided on: 9th July, 1965.

Criminal Procedure Code, section 188—*How should a plea of guilt be recorded by a Magistrate.*

Where a plea of guilt is recorded as follows: "Accused states, 'I am guilty' under section 325."

Held: (1) That the plea had not been recorded as required by law.

(2) That where an accused person makes an admission of guilt, the accused's statement shall be recorded as nearly as possible in the words used by the accused as required by section 188 of the Criminal Procedure Code.

S. Nadesan, Q.C., with *A. Mahendrarajah*, for the accused.

K. Ratnesar, Crown Counsel, for the Attorney-General.

SRI SKANDA RAJAH, J.

Section 188 of the Criminal Procedure Code states that when any accused person makes an unqualified admission of guilt, the accused's statement shall be recorded as nearly as possible in the words used by the accused, but in this case, as pointed out in an earlier case from Balapitiya today (S.C. No. 20/65; M.C. Balapitiya, Case No. 43688), the plea is recorded as follows:—"Accused states, 'I am guilty' under section 325". It is impossible for this Muslim woman to have known the existence of this section 325 of the Penal Code. That is to say, the plea has not been recorded as required by law.

In the charge sheet the plea is recorded: "Guilty under provocation". It is not every

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provocation that reduces the offence under section 314 to one under section 325. The provocation should be " grave and sudden ".

The prosecuting Sub-Inspector informs this Court that the girl's father, who made the first complaint, made another statement several days later when he was accompanied by a Proctor and that the later statement indicated that there was provocation. This appears to have been made designedly. It is easy to discern who was responsible for the making of such a statement.

The charge was one of voluntarily causing hurt with a heated weapon, namely, a spoon, on a servant girl, aged 10 years. This Court is surprised at the manner in which this case has been disposed of. The principle adopted by some Magistrates seems to be : anything for the disposal of a case, regardless of how it is done.

I set aside the proceedings and send the case back for trial *de novo* before another Magistrate.

It would also appear from the record that the accused appeared in Court and the charge was read out to her on 5th June, 1965, but the charge reads as though the offence was committed on 12th June, 1965.

Set aside & sent back.

Present : **Sri Skanda Rajah, J.**

CHALOSINGHO *vs.* S.I. (CRIMES) AMPARAI

S.C. 1160 *of* 1964—*M.C. Kalmunai*, 13827.

Argued and decided on : February 8, 1965.

Evidence Ordinance, section 56—Can Court take judicial notice of the fact that " arrack " is an " excisable article ? "

Held : That a Magistrate is entitled to take judicial notice of the fact that " arrack " is an " excisable article".

Per SRI SKANDA RAJAH, J.—" Perhaps the charge would have been better framed if it had referred to the sale of " an excisable article, to wit, arrack ".

Cases referred to : *Christoffelsz* v. *Perera*, (1913) 17 N.L.R. 177 ; 1 C.A.R. 43
Paulickpulle v. *Pedrick*, (1914) 17 N.L.R. 350 ; 1 C.A.R. 60
Jayawardene v. *Aluwihare*, (1963) LXIV C.L.W. 92

M. T. M. Sivardeen, for the accused-appellant.

Ranjit Dheeraratne, Crown Counsel, for the Attorney-General.

SRI SKANDA RAJAH, J.

This is a charge under the Excise Ordinance.

The only point taken is that the charge referred to sale of arrack, but there is no proof that " arrack " is an " excisable article ". The evidence of the Excise Inspector is that the article sold was arrack. The Magistrate purported to take judicial notice that " arrack " is an " excisable article ".

In *Christoffelsz* v. *Perera*, 17 N.L.R. 177, it was held that " arrack " is an " excisable article " within the meaning of the Excise Ordinance. In *Paulickpulle* v. *Pedrick*, 17 N.L.R. 350, it was held that the Magistrate was entitled to take judicial notice of the fact that " arrack " is an " excisable article ".

Perhaps the charge would have been better framed if it had referred to the sale of " an excisable article, to wit, arrack ".

Besides, if the charge was defective, sections 171 and 425 of the Criminal Procedure Code would cover it as there was neither prejudice to the accused nor a miscarriage of justice, *Jayawardene* v. *Aluwihare*, 64 C.L.W. 92, at 94, S.C. 1200-1203/64, M.C. Colombo South, 38218/B—S.C. Minutes of 5th February, 1965).

The point taken, therefore, is untenable. The appeal is, therefore, dismissed.

Appeal dismissed.

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Present : **H. N. G. Fernando, S.P.J. and T. S. Fernando, J.**

BABYNONA RATNAWEERA *vs.* LIYANA PATABENDIGE AND OTHERS*

S.C. No. 586/63—*D.C. Tangalla, No.* 6207.

Argued on : 4th June, 1965.
Decided on : 22nd June, 1965.

Hypothecary action—Mortgaged property sold under decree—Fiscal directed to deliver possession to purchaser—Shortly thereafter, application to recall writ by party acquiring title from mortgagor after " lis pendens "registered—Court allowing such application but order not communicated to fiscal—Second application by same party to be restored to possession allowed by Court—Is such order valid ?—Mortgage Act, (*Cap.* 89), *sections* 5, 16, 34, 35, 36, 54 *and* 55.

The appellant purchased a property sold in execution of a hypothecary decree and was placed in possession thereof by the Fiscal on an order of Court. Shortly before delivery of possession by the Fiscal, the Court recalled the writ on a claim made by the respondent on the ground that the mortgagor-defendant had, after the hypothecary decree was entered, transferred the property to her. This order staying execution was not communicated to the Fiscal in time and, therefore, the respondent made application to Court that she herself be restored to possession which was allowed. On an appeal preferred against this order.

Held : (1) That as the plaintiff in the mortgage action had not followed the procedure set out in section 34, 35 and 36 of the Act, the proper order for possession to the purchaser should have been made under section 54 of the Act.

(2) That the respondent was not entitled to possess the land as against the purchaser because she, having acquired title from the mortgagor after the registration of *lis pendens* of the hypothecary decree, is bound by the hypothecary decree in terms of section 16 of the Act.

(3) That, therefore, the order directing the fiscal to place the respondent in possession of the land must be set aside.

D. R. P. Goonetileke, for the purchaser-appellant.

No appearance for the respondents.

H. N. G. FERNANDO, S.P.J.

After hypothecary decree was entered in this Mortgage Action, the property mortgaged was sold in execution of the decree and was purchased by the present appellant. Thereafter, the Court made order for the delivery of possession of the property to the appellant and the appellant was, in fact, placed in possession by the fiscal.

It would appear that shortly before the appellant was placed in possession the Court recalled the Writ of possession upon an application made by the present respondent, who put forward a claim to the property on the ground that the mortgagor-defendant had, after the hypothecary decree was entered, executed a transfer of the property to the respondent. This stay of execution of the Writ was not brought to the notice of the fiscal in time for him to act upon it. Thereafter, however, the respondent came to Court, this time contending that she herself be restored to possession. This application was allowed by the District Judge by his order of 30th July, 1963, against which this appeal had been preferred.

The ground upon which the District Judge made order staying execution of the Writ he had issued was that in issuing the Writ he had purported to act under section 55 of the Mortgage Act. The Judge was right in thinking subsequently that that section did not apply, because the plaintiff in the Mortgage Action had not followed the procedure set out in section 34, 35 and 36 of the Act. But in deciding thereafter that the respondent should be restored to possession the learned Judge failed to consider relevant provisions of the Act. It would perhaps be helpful to give a brief explanation of those provisions.

* For Sinhala translation, see Sinhala section, Vol. 10 part 3, p 9.

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Section 5 of the Act defines, in relation to a Hypothecary Action in respect of land, the "persons entitled to notice of the Action". These are persons who have interests in the land by virtue of instruments to which the mortgage in suit has priority, and which have been registered prior to the registration of the *lis pendens* of the Hypothecary Action.

Thereafter the Act makes provision designed to secure that all "persons entitled to notice" are joined in the action either as original parties or by subsequent joinder. The Act also provides for the eventuality that a person entitled to notice may not have been, in fact, joined before entry of a Hypothecary Decree.

A person in the position of the respondent, who acquires title from the mortgagor *after* the registration of the *lis pendens* of the Hypothecary Action is not a person entitled to notice of the action. It does not follow (as the learned Judge wrongly thought) that such a person is not bound by the Hypothecary Decree. Section 16 expressly deals with this case and provides that such a person "shall be bound by every order, decree or sale or thing done in the Hypothecary Action." It is not relevant for the present purpose to consider the Proviso to that section. which empowers the Court to permit such a person to be joined on terms.

In the present action the proper order for possession should have been made under section 54 of the Act. If such an order was made it would have bound the present respondent in terms of section 16. Accordingly the respondent had nothing more than a mere technical ground of complaint that the Writ had been issued under section 55. She was not entitled to possess the land as against the appellant because she was bound by the Hypothecary Decree.

The order of July 30th, 1963, directing the fiscal the place the present respondent (*i.e.*, the claimant petitioner referred to in the order) in possession of the land must, therefore, be set aside.

If the appellant requires the further assistance of the Court he will be entitled to an order for delivery of possession under section 54 ; and if such an order is made the District Court must act on the basis that the present respondent is a party bound by the Decree and sale in the Hypothecary Action.

The present respondent must pay the costs of this appeal and of the proceedings of 30th July, 1963.

T. S. Fernando, J.
I agree.

Appeal allowed.

Present : **Sri Skanda Rajah, J.**

S. I. POLICE, BORELLA *vs.* ELIYATHAMBY

S.C. 1295/64—*M.C. Narahenpita*, 4305.

Argued on : 26th March, 1965.
Decided on : 1st April, 1965.

Criminal Law—Appeal on question of fact—Principles on which a Court of Appeal should interfere?

Right of appeal against acquittals—Desirability of amending Court of Criminal Appeal Ordinance providing for right of appeal against acquittals.

Held : That a Court of Appeal can interfere with a finding of fact only when it can say that no reasonable man can reasonably come to the conclusion which the trial judge arrived at in the case.

Per Sri Skanda Rajah, J.—"The right of appeal against acquittals may, in the public interest, be put to more use. Also it seems desirable to amend the Court of Criminal Appeal Ordinance giving the Crown the right to appeal against acquittals, unreasonable verdicts and inappropriate sentences."

Case referred to : *Griffiths* v. *J.P. Harrison, (Watford), Ltd.,* (1962) 1 A.E.R. 909 ; (1962) 2 W.L.R. 909

A. C. de Zoysa, Crown Counsel, for the Solicitor-General (appellant).

S. Sharvananda, for the accused-respondent.

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SRI SKANDA RAJAH, J.

This is an appeal by the Solicitor-General from the order of acquittal entered by the Magistrate (Traffic), Narahenpita.

The accused was charged as follows : " You are hereby charged, that you did, within the jurisdiction of this Court, at Jawatte Road, on 19th October, 1963, being the driver of private car, E.N. 7869, drive the same on the above highway negligently by doing one or more or all of the following negligent acts to wit : (*a*) by driving the said vehicle without due care and precaution ; (*b*) by driving the said vehicle without a proper lookout ; and (*c*) by driving the said vehicle without reasonable consideration for other users of the said highway and thereby collide with a horse ridden by Mr. C. H. M. P. Fernando and cause injury to Mr. Fernando of No. 29/2, Station Road, Wellawatte, and injury to the horse in breach of section 151 (3) read with section 214(1) (*a*) of Chapter 203 of the L.E.C. and thereby committed an offence punishable under section 217 (2) of Chapter 203 of the Legislative Enactments of Ceylon.

" At the same time and place aforesaid, the aforesaid accused being the driver of private car, EN 7869, drive the same on the above highway and failed to keep to the left or near side of the said highway when meeting traffic to wit : the horse ridden by Mr. Fernando and collide with the horse and cause injury to the horse and Mr. Fernando in breach of section 148 (1) read with section 214 (1) (*a*) of Chapter 203 of the L.E.C. and thereby committed an offence punishable under section 224 of Chapter 203 of the L.E.C.".

Though a point of law regarding the first charge was considered by the Magistrate he disposed of the case finally as follows :

> This, in my opinion, is irregular. In any event, upon the facts, I hold that the charges against the accused have not been proved beyond reasonable doubt."

There is no merit in the alleged point of law.

Lord Denning in *Griffiths* (*Inspector of Taxes*) v. *J. P. Harrison* (*Watford*), *Ltd.*, (1962) 1 A.E.R. 909, at 916, enunciated the following proposition as regards interference by a Court of Appeal with a finding of fact. Said he : " It is not sufficient that the Judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions and often do. Juries do. So do judges. And are they not all reasonable men ? But there comes a point when a Judge can say that no reasonable man can reasonably come to that conclusion. Then, but not till then, he is entitled to interfere. " This is one of those cases in which that point has been reached.

The injured person Fernando's evidence was as follows : " On 19th October, 1963, about 8 a.m. he was riding a horse. One Miss Crawford was riding another horse. They had just got on from Buller's Road into Jawatte Road and were on their way back to the stables. Miss Crawford was riding on the grass verge on Fernando's left and he was on the left of the tarred portion, which was 29 ft. 10 ins. in breadth. The car driven by the accused came in the opposite direction. Fernando noticed the car when it was about 100 yards away. There was no other traffic on the road. Though at first the car was proceeding in the normal way it suddenly swerved to its right when it was about 50 ft. away. Fernando looked to see if some friend of his was doing so for a joke. He noticed that the driver was not a friend and that he was not looking ahead, but through the window on his right. The car hit Fernando's horse. The horse and Fernando fell. He sustained injuries and was unable to get up. The accused removed Fernando in his car to the hospital. Fernando said, " I spoke to the accused while he was taking me to the hospital. He revealed his identity to me. He said his name is Eliyatamby, an accountant of United Tractors, Colombo. *I told him that he was not looking at the road at the time he was driving and that he was looking elsewhere. He did not say anything to that . . . He said he did not know how this could have happened.*"

Not one question was put in cross-examination to Fernando as regards his evidence-in-chief (*in italics*) above. Nor did the accused, who gave evidence, deny the truth of it. At that stage the accused did not dispute Fernando's accusation.

In cross-examination Fernando said this : " I do not know the reason why it (the car) swerved to the right. The only explanation I can offer is that the driver was looking to the right and, did not have a proper view of objects in front of him. I did not notice anything myself on the right.

(*To Court :*

Q. Did you notice anything on the left ?

A. I did not notice anything on my left, either").

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From this evidence the Magistrate concludes, "It is inconceivable that the accused would have been looking through the window on his right on some object on the right which Mr. Fernando himself did not notice". It does not require much imagination to conclude that the accused was looking at the woman-rider who was on Fernando's left.

The accused's evidence-in-chief was that a cyclist emerged suddenly from Jawatte Lane, which is perpendicular to Jawatte Road and parallel to Buller's Road, and crossed his path. He tried to avoid the cyclist by swerving to the right; then the horse became restive. Therefore, he swerved to the left. The evidence of damage on the car on the left headlamp, etc., would negative this story.

The accused, however, made a statement to the Police after the conversation between him and Fernando on the way to the hospital. In it he stated, apparently in an attempt to create a defence, "I saw a pedal cyclist on my side riding towards my car from the direction of Buller's Road". In cross-examination he said, "It is correct to say that a pedal cyclist was riding on my side of the road, coming from the direction of Buller's Road. . . . In my statement to the Police, I said that the cyclist came from the direction of Buller's Road". It is clear that at that time he made no reference to the cyclist emerging from Jawatte Lane, nor did he mention Jawatte Lane at all. If a cyclist came from Jawatte Lane he would not have been coming from the direction of Buller's Road.

When this serious contradiction was pointed to respondent's counsel he ventured to suggest that "the accused must have so struck the Magistrate" that he accepted his evidence. If the Magistrate was "struck" he appears to have struck blind—blind to reason.

Jockey Somapala's evidence regarding the difference in behaviour between thorough-bred animals and Arabs has no relevance. If a car is driven straight into any horse, whether thorough-bred or Arab, it is bound to react in self-defence. The Magistrate appears to have been taken for a ride by introducing this evidence.

The accused's evidence that he did not notice Fernando and his horse till he swerved the car to avoid the cyclist who suddenly emerged in front of the car from a side road amounted to an admission that he was driving the car "without keeping a proper lookout", an element alleged in the first charge. The Magistrate himself says, "when he (accused) saw the horse for the first time it was 20 ft. ahead."

It would, therefore, appear that the defence is palpably false.

The verdict is capable of explanation only on one or two bases; that the Magistrate either allowed himself to be taken for a ride or adopted, what may be termed, the path of least resistance, resulting from the knowledge that there is hardly an appeal from an acquittal. The well-known reluctance of the Attorney-General to appeal against acquittals often provides an easy way out for Magistrates. The right of appeal against acquittals may, in the public interest, be put to more use. Also it seems desirable to amend the Court of Criminal Appeal Ordinance giving the Crown the right to appeal against acquittals, unreasonable verdicts and inappropriate sentences.

I would set aside the verdict of acquittal and convict the accused of both charges. Return record to the Magistrate directing him to impose an appropriate sentence on each count.

Accused convicted.

Present : **Abeyesundere, J., and G. P. A. Silva, J.**

K. PONNIAH *et al. vs.* R. N. RAJARATNAM

S.C. No. 436/'63 (*F.*)—*D.C. Jaffna, No. M.B.*/5266.

Argued on : 18th November, 1964, and 1st December, 1964.
Decided on : 16th December, 1964.

Debt Conciliation Ordinance, section 56—*Application for relief*—"*Any matter pending before the Board*"—*Bar of civil action.*

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An application for relief was made by the defendants to the Debt Conciliation Board dated 24th November, 1962, and was received in the office of the Board on 26th November, 1962. The plaint was filed in the District Court on 10th December, 1963.

Held : (1) That the word " pending " in section 56 of the Debt Conciliation Ordinance means, "awaiting decision or settlement ".

(2) That from 26th November, 1962, which was the date on which the application was received in the office of the Board, the application was awaiting a decision on it by the Board, and was, therefore " pending " before the Board.

Case referred to: *Simon Silva* v. *The Debt Conciliation Board*, (1963) LXIV C.L.W. 36

P. Nagendram, for the defendants-appellants.

V. Arulambalam, for the plaintiff-respondent.

ABEYESUNDERE, J.

In this action the plaintiff sued the defendants on a mortgage bond to recover the principal and interest due and to obtain an order declaring the mortgaged properties to be bound and executable for the payment of the moneys due upon the mortgage and to enforce such payment by a judicial sale of such properties. The plaint was filed on 10th December, 1962. The defendants made an application dated 24th November, 1962, to the Debt Conciliation Board, hereinafter referred to as the Board, to effect a settlement of the debt owed by them to the plaintiff. That application was received in the office of the Board on 26th November, 1962. The defendants pleaded in their answer that their application was pending before the Board when the plaint was filed in the District Court of Jaffna and that, therefore, by reason of section 56 of the Debt Conciliation Ordinance, hereinafter referred to as the Ordinance, the said District Court should not have entertained the action of the plaintiff. The learned District Judge who tried the action held that at the time the plaint was filed the application of the defendants was not pending before the Board and entered judgment and decree in favour of the plaintiff. The defendants have appealed from such judgment and decree.

The learned District Judge was of the view that the application of the defendants could not be said to be pending before the Board until it had been entertained by the Board and, following the decision of this Court in the case of *Simon Silva* vs. *The Debt Conciliation Board*, 64 Ceylon Law Weekly, page 36, held that, as the letter P 4 dated 21st January, 1963, sent by the Secretary of the Board to the plaintiff stated that the application of the defendants would be dealt with by the Board, the said application had not been considered by the Board even on that date and, therefore, when the plaint was filed on 10th December, 1962, the said application had not been entertained by the Board.

The learned District Judge appears to have assumed that the expression " pending before the Board " occurring in section 56 of the Ordinance is synonymous with the expression " entertained by the Board ". In the context relevant to this appeal the word " pending " means " awaiting decision or settlement " and the word " entertain " means " consider ". In the aforesaid case of *Simon Silva* v. *The Debt Conciliation Board* this Court construed the word " entertains " occurring in section 19A(2) of the Ordinance to mean " considers " and indicated in the context of that section that when the Board considers an application the Board entertains that application. The judgment of this Court in the aforesaid case does not apply to the action to which the appeal under consideration relates as it is the word " pending " occurring in section 56 of the Ordinance and not the word " entertains " occurring in section 19A (2) of the Ordinance that has to be construed for the purpose of determining the said action. The learned District Judge has misdirected himself in construing the word " pending" to have the same meaning as the word " entertains ".

From 26th November, 1962, which was the date on which the application of the defendants was received in the office of the Board, that application was awaiting a decision on it by the Board and, as is evident from the letter P 4 sent by the Secretary

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of the Board to the plaintiff, it was awaiting such a decision even on the date of that letter, namely, 21st January, 1963. Therefore, when the plaint was filed in the District Court of Jaffna on 10th December, 1962, the application of the defendants was pending before the Board. That Court was consequently prohibited by section 56 of the Ordinance from entertaining the action of the plaintiff.

I set aside the judgment and decree of the learned District Judge and dismiss the plaintiff's action. The defendants are entitled to their costs of the action in the District Court and their costs of the appeal.

G. P. A. SILVA, J.
I agree.

Appeal allowed.

Present : **Alles, J.**

H. C. SIRISENA *et al. vs.* W. P. WARAKAGODA (I. P. WELLAWATTA)*

S.C. 1134-1135/1964—*M.C.*, *Colombo-South*, *No.* 29552/*B.*

Argued and decided on : 16th February, 1965.

Excise Ordinance, section 37—Entry by Police on premises of accused without search warrant purporting to act under section 37—Failure to produce proof of compliance with the requirements of the section—Conviction of accused for obstructing police officers in the lawful exercise of their duties—Can conviction be sustained ?

The Police entered the premises of the 2nd accused on information that the accused was in possession of unlawfully manufactured liquor. The Police did so without a search warrant, purporting to act under section 37 of the Excise Ordinance. At the trial the prosecution failed to produce proof of compliance with the requirements of section 37.

Held : That the entry by the police on the premises of the accused was *prima facie* illegal and, therefore, conviction on a charge of obstructing the police in the lawful exercise of their duties could not be sustained.

H. Rupasinghe, for the accused-appellants.

U. C. B. Ratnayake, Crown Counsel, for the Attorney-General.

ALLES, J.

It is with regret that I am compelled to set aside the conviction and sentences of the accused-appellants on counts 1, 2, 3 and 4. It is mainly due to the carelessness of the prosecuting officers. According to the evidence of the Police, they entered the premises of the 2nd accused on information that the accused were in possession of unlawfully manufactured liquor. They did not obtain a search warrant but purported to act under section 37 of the Excise Ordinance. Under section 37, when an officer is not able to obtain a search warrant without affording the offender an opportunity of escape, he may, after recording the grounds of his belief, enter and search any place and may seize anything found therein. Sub-inspector Thangiah, who was in charge of the raid on the accused's premises gave evidence that he explained the purpose of his arrival to the 2nd accused and wanted to search the premises. In cross-examination he said that he could not obtain a search warrant and that he acted under section 37 of the Excise Ordinance when he went to raid the premises. He said that he was not producing any proof that he was acting under the section. Even after being reminded of this fact no evidence was led by the prosecution to comply with the peremptory requirements of section 37 of the Excise Ordinance. *Prima facie*, therefore, the entry of the Police to the premises of the 2nd accused was illegal and the charge of obstructing the Police officers in the lawful exercise of their duties and causing hurt to them in that process cannot be substantiated. The accused, therefore, are entitled to an acquittal on charges 1 to 4. Charges 6 and 7 are in the alternative to counts 3 and 4. Under count 6 the 1st accused has been found guilty of voluntarily causing grievous hurt to Police constable Gunasingha and sentenced to three months' rigorous imprisonment. There is conflict of testimony in the prosecution evidence as to whether the grievous hurt that was caused to Police constable resulted from a blow with an

* For Sinhala translation, see Sinhala section, Vol. 10 part 3, p. 11.

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iron rod. Police constable Gunasingha stated in his evidence that the injury was caused by an iron rod. The doctor whose deposition was led at the trial under section 33 of the Evidence Act stated that the injury to the teeth could not have been caused by a blow with an iron rod. In the circumstances I alter the conviction under count 6, to one of causing simple hurt under section 314 of the Penal Code. Under count 7 the 2nd accused has been convicted of assaulting Sub-inspector Thangiah with hands and bottles and thereby committed an offence under section 314 of the Penal Code and under count 5 the 1st accused has been found guilty of voluntarily causing hurt to Police constable Jayatilaka by assaulting him with bottles.

In view of the irregularity of the procedure that has been adopted at the trial, I set aside the convictions of the accused on counts 1 to 4. I uphold the conviction of the 1st accused under count 5 with causing hurt to Police constable Jayatilaka. I alter count 6 to one of voluntarily causing hurt to Gunasingha. With regard to count 6, I impose the sentences which has been imposed by the Magistrate. The sentences on counts 3 and 6 will run consecutively. With regard to the 2nd accused I uphold his conviction under count 7, and the sentence passed on him. He will consequently undergo a term of 3 months' rigorous imprisonment.

Varied.

Present : **T. S. Fernando, J.**

RATNATUNGA ARACHCHIGE PREMARATNE

vs.

M. T. GUNARATNA, Inspector of Police, Anuradhapura

S.C. No. 1393 *of* 1964—*M.C. Anuradhapura*, 2985.

Argued on : March 9, 1965.
Decided on : March 19, 1965.

Criminal Procedure Code, section 287—*Application for postponement, as accused not ready for trial—Time to retain Counsel.*

Held : That the right of a person who is accused of a criminal offence to be defended by a lawyer of his choice is one now ingrained in the Rule of Law which is recognised in the law of criminal procedure in most civilized countries and is one expressly recognised by section 287 of our Criminal Procedure Code.

G. E. Chitty, Q.C., with *S. W. Jayasuriya* and *E. B. Vannitamby*, for the accused-appellant.

Ranjit Dheeraratne, Crown Counsel, for the Attorney-General.

T. S. Fernando, J.

The appellant has been convicted on a charge of theft of cash Rs. 26/- by picking the pocket of one Dissanayake.

Mr. Chitty appearing on his behalf at the hearing of this appeal before me has contended that, as a result of the refusal by the learned Magistrate who tried this case to grant the appellant's application for a postponement of the trial to enable him to get ready therefore, the appellant has been gravely prejudiced in the presentation of his defence and a denial of justice has occurred.

Although the appellant was first brought before the Magistrate on 6th July, 1964, in respect of this offence alleged to have been committed on 24th June, 1964, he was charged only on 19th October, 1964. On this last-mentioned date, after his plea of not guilty had been recorded, the Magistrate fixed the trial for the 24th October, 1964. The record made on this date reads :— " Accused to be on same bail ".

On 24th October, 1964, the appellant appeared in person without any pleader and the prosecution had the assistance of Mr. Delgoda, proctor. The appellant thereupon begged that a postponement be granted as he had not been able to get ready for trial that day. The learned Magistrate, recording that the appellant has had ample time to get ready for trial, refused a postponement, proceeded to trial and convicted the appellant that very day.

The record shows that the appellant did not put a single question in cross-examination to any

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of the witnesses for the prosecution and did not give any evidence on his own behalf at the end of the case for the prosecution.

Mr. Chitty has brought to my notice a copy of the record in M.C. Anuradhapura, Case No. 5007, from which it would appear that the appellant had been arrested by the Anuradhapura Police on 19th October, 1964, in connection with another charge and had been ordered to be remanded till 26th October, 1964. From a perusal of the record in that case it is quite apparent to me that the appellant was on remand from 19th October, 1964, till 26th October, 1964, except when his presence was necessary in Court for some time on 19th October and 24th October in connection with the plea and the trial, respectively, in case No. 2985. When the learned Magistrate recorded on 24th October, 1964, in case No. 2985 that the appellant has had ample time to get ready for trial he probably had in mind an entry of 19th October, 1964, in that case that the appellant could stand out " on the same bail ". It is quite obvious that his attention was not directed to the circumstance that while the appellant was permitted to stand out on bail already furnished in connection with case No. 2985 he had been refused bail in case No. 5007 and was consequently in custody of the Fiscal.

The right of a person who is accused of a criminal offence to be defended by a lawyer of his choice is one now ingrained in the Rule of Law which is recognized in the law of criminal procedure of most civilized countries and is one expressly recognized by section 287 of our Criminal Procedure Code which enacts that " every person accused before any criminal Court may of right be defended by a pleader ". Although the learned Magistrate did not expressly deny the appellant that right, it is apparent to me that, in the erroneous belief that the appellant was on bail between 19th and 24th October, his decision to go on with the trial had the same unfortunate effect. I would, therefore, quash the conviction and sentence and order that the appellant be tried afresh on the same charge before another Magistrate.

Set aside and sent back.

IN THE COURT OF CRIMINAL APPEAL

Present : **T. S. Fernando, J., (President), Sri Skanda Rajah, J., and G. P. A. Silva, J.**

U. A. GUNADASA *alias* DON CHARLES AND ANOTHER *vs.* THE QUEEN

C.C.A. Appeals, Nos. 96 *and* 97 *of* 1964
(*with Applications for Leave to Appeal*—99 *and* 100 *of* 1964).
S.C. Case, No. 59—*M.C. Tangalle*, 26283.

Argued and decided on : 26th October, 1964.

Evidence Ordinance, section 32 (1)—*Statement made by a deceased person relating to cause of death—When admissible.*

In the course of a murder trial, the prosecution led in evidence under section 32 of the Evidence Ordinance, three statements made by the deceased on the following dates :—

30th June, 1962 ; 8th September, 1962 ; 14th October, 1962.

The date of the alleged offence was 24th November, 1962.

Held : That the statements were wrongly admitted.

Per T. S. FERNANDO, J.—" A statement of a deceased can only be used as a relevant fact in the limited circumstances set out in section 32 of the Evidence Ordinance. Sub-section (1) of that section permits the admission of a statement made by a person who is dead when that statement relates to the cause of his death or to any of the circumstances of the transaction which resulted in his death. "

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Colvin R. de Silva with *M. L. de Silva, Manouri de Silva* and *K. Vignarajah* (*Assigned*), for the accused-appellant.

P. Colin Thome, Crown Counsel, for the Attorney-General

T. S. Fernando, J.

The appellants appeal from convictions upon a charge of murder. The appeals must be allowed and the convictions quashed.

The reason for taking this couse is that at the trial of the appellants inadmissible evidence in the shape of three documents, P 21, P 23, and P 20, respectively, was admitted as part of the Crown case. The deceased was alleged to have been killed on the 24th November, 1962. P 21 is a statement made by the deceased on the 30th June, 1962, to the Tangalle Police, nearly five months prior to his death. It would appear from the summing-up of the learned trial judge that he instructed the Jury that P 21 could be used as corroboration of the evidence of one of the witnesses, namely, witness, Podihamy. The second statement, P 23, was one made by the deceased on the 8th September, 1962, while the third statement, P 20, was a written complaint made to the Police by the deceased on the 14th October, 1962.

A statement of a deceased can only be used as a relevant fact in the limited circumstances set out in section 32 of the Evidence Ordinance. Sub-section (1) of that section permits the admission of a statement made by a person who is dead when that statement relates to the cause of his death or to any of the circumstances of the transaction which resulted in his death. It is conceded by counsel appearing before us for the Crown that the statements referred to in the above paragraph do not fall within the category of statements rendered relevant by the said section 32 (1). They were, therefore, irrelevant and inadmissible and should not have been introduced by the Crown. This point appears to have escaped the attention not only of Crown Counsel who prepared the indictment, but also of Crown Counsel who led evidence at the trial. It is a matter for surprise that even Counsel for the defence failed to object to the admission of this evidence with the result that the matter escaped the attention of the learned trial Judge himself.

In our opinion there was evidence before the Jury, even if the statements referred to above were excluded, on which the accused might reasonably have been convicted. In these circumstances, while quashing the convictions, we order that the accused be tried anew upon the same indictment

Convictions quashed.

Present : **T. S. Fernando, J.**

K. B. PABAWATHIE *vs.* M. P. SOMAPALA

S.C. No. 82/62—*C.R. Kurunegala, No.* 1151/*L.*

Argued and decided on : 3rd March, 1964.

Court of Requests—Application for declaration of a right of way—Damages for obstruction of said right of way—Jurisdiction of Court of Requests—Rural Courts Ordinance, section 9, *First Schedule.*

Held : That the proper Court in which to institute an action for a declaration of a right of way and for damages for obstruction of the said right of way, is the Court of Requests and not the Rural Court.

W. D. Gunasekera, for the plaintiff-appellant.

S. Sharvananda, for the defendant-respondent.

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T. S. FERNANDO, J.

The plaintiff instituted this action in the Court of Requests claiming a right of way by prescriptive user, or alternatively, as a way of necessity, damages for obstruction of the said right of way and costs. One of the defences taken was that the Court of Requests had no jurisdiction to entertain the claim by reason of the circumstance that exclusive jurisdiction to decide the plaintiff's claim was vested in the Rural Court.

The Commissioner of Requests held with the defendant on the question of jurisdiction, but went on to consider the evidence in regard to the claim of the plaintiff to a right of way.

In regard to the question of jurisdiction, it appears to me that the learned Commissioner was clearly wrong. Exclusive jurisdiction is conferred on the Rural Court by virtue of section 9 of the Rural Courts Ordinance (Cap. 8). The proviso to section 9 reads as follows :—

> " Provided, however, that no Rural Court shall permit the institution of, or have or exercise jurisdiction in, any action or proceedings of any class or description included for the time being in the First Schedule of this Ordinance, irrespective of the amount of the demand or the damage claimed or of the value of the subject-matter."

When one, therefore, turns to the First Schedule which enumerates the actions excluded from the jurisdiction of the Rural Court, one will find that item 12 excludes from Rural Court jurisdiction any action for a declaratory decree other than a decree for the declaration of title to land. Therefore, an action for a right of way would be excluded as falling under item 12 of that Schedule. Again, if one examines item 24 in the same Schedule one will see that that item embraces any action for compensation or damages for obstruction to or interference with the enjoyment of any servitude or the exercise of any right over property. Therefore, that part of the plaintiff's claim for damages for obstruction to the exercise of the servitude is also excluded from Rural Court jurisdiction—*vide* item 24 (i). Therefore, the Court of Requests clearly had jurisdiction to entertain the plaintiff's claim. Learned counsel for both parties at the appeal conceded that the Court of Requests was competent in law to entertain and adjudicate upon all the claims of the plaintiff.

Counsel for the defendant-respondent invited me to consider the evidence led in the case and certain findings reached or opinions expressed by the learned Commissioner on that evidence. I think it is unprofitable to examine the findings and the opinions of the trial judge expressed on the evidence in a case where the judge has held that he had no jurisdiction to entertain the claim. If I may say so with respect, all such findings or opinions are *obiter*, and it will be unsatisfactory for me to go on the assumption that, if the Court had jurisdiction, those findings and opinions would have been considered to be the findings and opinions of a trial judge who thought he was exercising jurisdiction in the case. The question of jurisdiction should have been decided first as a question of law, and evidence should have been taken only if the Commissioner came to the conclusion that he had jurisdiction to entertain the evidence.

The judgment and decree under appeal must be set aside and the case remitted for trial on the issues already framed and any other issues which the Court may now permit the parties to raise ; it should, of course, be now understood that issue 6 relating to the exclusive jurisdiction of the Rural Court has been answered against the defendant.

The plaintiff will have the costs of this appeal, but the costs of the trial already had and the costs of the resumed trial will be costs in the cause.

Appeal allowed.

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IN THE COURT OF CRIMINAL APPEAL

Present : **H. N. G. Fernando, S.P.J., T. S. Fernando, J., and Abeyesundere, J.**

THE QUEEN *vs.* MATHIAS ANTHONYPILLAI

Appeal No.S.C. No. 21/64.
Application No. 49/1965—*M.C. Jaffna,* 26739.

Argued on : 21st and 22nd June, 1965.
Decided on : 19th July, 1965.

Court of Criminal Appeal—Conviction for murder—Right of prosecution to call witness not on the back of indictment and who has not given evidence in Magistrate's Court—Need to give adequate notice to defence and sufficient opportunity for preparation to cross-examine such witness—Effect of failure to do so.

Evidence—Misdirection—Dying declaration—Failure by the Trial Judge to caution the jury as to the risk of acting on such evidence and to direct them as to the need to consider with special care the question whether such statement could be accepted as true and accurate—Possibility of accident—Need to direct jury thereon—Miscarriage of justice.

The appellant was convicted of the murder of his wife and sentenced to death. The evidence against him consisted of :—

(*a*) a statement by the deceased woman to the Police on 1st September, 1963, to the effect that the appellant poured some liquid smelling of kerosene oil into her mouth, when she opened her mouth at his request to see whether her decayed teeth were removed and whether there were any more to be removed ;

(*b*) the opinion of the doctor, who attended on her after admission to the hospital (for two hours only, to wit: 2 a.m. to 4 a.m. on 2nd September, 1963) to the effect, (i) that she had taken some poison of the Folidol type containing parathion, because of the symptoms he noticed on her ; (ii) that pneumonia was a probable consequence of the effect on lungs of a poison of the parathion type.

(No evidence was called to speak to her condition and treatment during the period from 4 a.m. on 2nd September, 1963, to her death at 9.15 p.m., on 4th September, 1963).

(*c*) the opinion of the Acting Judicial Medical Officer who held the post-mortem to the effect that death was due to Broncho-pneumonia involving both lungs and acute tracheitis, and possible toxaemia due to round worms.

In this state of the prosecution evidence, application was made to call a new witness not named in the indictment. This was objected to by the defence, but the learned trial Judge after hearing argument granted the application observing *inter alia* that the defence was made aware of the application about a month earlier, that it had the depositions of the medical witnesses, that it could have sought expert opinion, if it chose to, and that there would be no prejudice caused to the defence.

In consequence of this order, the new witness called was Dr. *A.*, the Deputy Judicial Medical Officer, Colombo a precis of whose evidence was not made available to the defence. He expressed the opinion that death could not have been due to toxaemia caused by round worms, and that the deceased woman must have contracted pneumonia because of the administration of some poison containing parathion.

The learned trial Judge invited the jury to disregard the possibility that toxaemia due to round worms must have been a contributory cause of death, and laid stress on the opinion of the new witness, Dr. A., as to the probable cause of death.

Held : (1) That the prosecution was entitled to call the new witness, Dr. A., though his evidence had not been led in the Magistrate's Court, but the failure on the part of the prosecution to give the defence, adequate notice of the nature of the new evidence and also sufficient opportunity for preparation to cross-examine him had resulted in grave prejudice to the accused.

(2) That it was doubtful whether the jury would have reached their verdict of murder, if there had been before them some evidence concerning the treatment and condition of the patient during the sixty-five hours which preceded her death.

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Held also : (3) That the failure on the part of the learned trial Judge—

(*a*) to caution the jury as to the risk of acting upon a dying declaration, being the statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate ; and

(*b*) to direct the jury that even if the appellant caused the death of his wife by administering some liquid, the burden lay on the prosecution to exclude the possibility of accidental administration,

had resulted in a miscarriage of justice.

Followed : *Thuraisamy* v. *The Queen,* (1952) 54 N.L.R. 449 : XLVII C.L.W. 105

K. Charavanamuttu (*assigned*), for the accused-appellant.

R. Abeysuriya, C.C., for the Crown.

H. N. G. FERNANDO, S.P.J.

The appellant was convicted of the murder of his wife and sentenced to death. On the night of the incident, 1st September, 1963, she made three statements, each to the effect that at about 11.30 p.m. the appellant had poured some liquid smelling of kerosene oil into her mouth. It suffices to quote a part of one statement which she made to a Police officer :—

> " Today at about 11.30 p.m., my husband spoke to me and requested me to open my mouth to see whether the decayed teeth were removed and whether there were anymore to be removed. I opened my mouth. He then poured something from a bottle he had in his hand. It was a small bottle. The bottle was covered with his hand. Only the mouth was visible. I did not swallow. I put the contents out. I opened the gate and came out. I vomited again."

After admission to hospital, the deceased woman was found by the Doctor who attended on her to be unconscious or semi-conscious. This Doctor formed the opinion that she had taken some poison of the Folidol type containing parathion ; this was because of the symptoms he noticed, namely :—

> " She was frothing at the mouth and was Dyspynoes. She was finding it difficult to breathe. Her pupils were unequal and both contracted and the lungs showed crepitation."

He accordingly treated her, mainly with a number of injections, on the basis of this diagnosis, and in his opinion the diagnosis was correct because the patient responded to the treatment within a few hours. After that stage, however, the woman appears to have suffered from Bronchopneumonia and she died on 4th September about seventy hours after the alleged administration of the poison. In his evidence at the trial, this Doctor expressed his opinion that pneumonia was a probable consequence of the effect on the lungs of a poison of the parathion type. In fact, he said that he had administered to his patient an antidote against pneumonia for this very reason. Considering that the deceased woman's death was not, according to this evidence, directly caused by the administration of the poison, it is at the least uncertain whether the Jury would have been willing to act on the opinion of the Doctor that pneumonia had probably resulted from the administration of the poison, and not from some other cause. The Doctor himself did not profess to have expert knowledge of the consequence of the administration of a poison of the type which he suspected in this case. The doctor was a young man, aged about twenty-seven in September 1963, and he said that this was the first case he had dealt with, where there was suspected administration of Folidol.

This was only one difficulty which the prosecution encountered. Another was that an acting Judicial Medical Officer, who performed the post-mortem examination, had expressed in his report the following opinion :—

> " In my opinion, death was due to Broncho-pneumonia involving both lungs and acute tracheitis, and possible toxaemia due to round worms. Evidence of poisoning is awaited the analysts' report on Stomach contents, Liver and Spleen submitted herewith."

On that opinion, upon which the defence could, no doubt, have relied at the Trial, the Jury might not have been able to rule out the possibility that toxaemia due to worms had, at least, contributed to the death of the deceased woman, and to exclude the consequential doubt whether the death resulted from the administration of some liquid.

This difficulty was overcome by an application made in the course of the trial to call a new witness not named in the indictment. An objection being

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taken by the defence the Court heard arguments and ultimately allowed the application in the following terms :—

> "If I am satisfied that it will prejudice your defence, I shall not allow the application. But, I do not think so.
>
> You say had you known of this earlier, you may have led expert evidence helpful to the defence but you had that opportunity since 5th April, 1965, when you were notified by the Crown. You had with you the findings of fact by the Medical witnesses in the depositions made to the Magistrate. You could have, if you chose to, sought expert opinion based on the data given by the medical men.
>
> You had the opportunity, you had the time, and you had the material which is more than precis. 'In the interests of Justice' does not mean the interests of the accused alone.
>
> I grant the application, the name of the witness to be added to the indictment."

In consequence of this order Dr. Chandra Amarasekera, Deputy Judicial Medical Officer, Colombo, gave evidence on the second date of trial. The importance of his evidence is made apparent in the charge to the Jury. In inviting the Jury to disregard the possibility that toxaemia due to round worms may have been a contributory cause of death the Trial Judge referred to the opinion of Dr. Amarasekera, " that death could not have been due to toxaemia caused by round worms, he was very emphatic on that ". Much stress was also laid on Dr. Amarasekera's opinion that the deceased woman must have contracted pneumonia because of the administration of some poison containing parathion. Indeed, it would be unsafe to suppose that the Jury would have returned their verdict of murder but for Dr. Amarasekera's evidence.

The prosecution was, no doubt, entitled to call Dr. Amarasekera as a witness, even though there had been an omission to lead in the Magistrate's Court evidence of the nature given by Dr. Amarasekera. But a series of cases in England has established that where it is necessary to lead such new evidence the Defence must be given adequate notice of the nature of the new evidence, as well as sufficient opportunity for preparation to cross-examine the witness who is to be called. In the present case the Defence had neither such notice nor such opportunity. The terms of the Judge's order quoted above make it clear that even if Defence counsel had asked for an adjournment of the trial such an application would have been refused. The Defence had been made aware about a month before the trial of the Crown's intention to call Dr. Amarasekera. But at that stage no copy of precis of Dr. Amarasekera's evidence had been furnished to the Defence. Having regard to the able manner in which Assigned Counsel represented his client at the trial, he could well have made valuable use of a reasonable opportunity for preparation to meet Dr. Amarasekera's evidence. The fact that such an opportunity was denied to the defence was gravely prejudicial.

Before turning to other aspects of the case it is convenient to refer to a matter which appears to have entirely escaped the attention of the Trial Judge. The deceased woman was admitted to Hospital at 2 a.m., on 2nd September. Dr. Joseph who attended to her immediately and who treated the case as one of suspected poisoning was with the patient until 4 a.m. Thereafter, he had nothing to do with the patient. Quite naturally, he gave no evidence whatever as to the history of the case during the sixty-five hours which preceded the death which took place at 9.45 p.m. on the 4th September. No Doctor or Nurse who attended to the patient during this period was called at the trial, and although the bed-head ticket was produced there is no reference in the evidence or in the summing up of any matters pertaining to the period after 4 a.m. on the 2nd September. It is impossible at this stage to say that the Jury would have reached their verdict of murder if there had been before them some evidence concerning the treatment and condition of the patient during the sixty-five hours which preceded her death.

The symptoms which Dr. Joseph said he had noticed have been mentioned in an earlier part of this judgment. But during his cross-examination he admitted that in the Magistrate's Court he may not have mentioned all the signs and symptoms described by him at the trial. It does not appear from the record that he stated the symptoms after reference to any notes made contemporaneously. In these circumstances, there was, at least, the possibility that the symptoms had not, in fact, been clearly recognised by Dr. Joseph at the time he examined the patient. This possibility was not adverted to in the charge to the Jury.

Apart from the medical evidence, the second important factor was the statement made to the Police by the deceased woman. With regard to this statement the learned Judge gave the following directions :—

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"This statement is evidence. The law permits you to take into consideration this piece of evidence. Usually a witness' evidence is tested by cross-examination and in this case the deponent is dead. In spite of the fact that there is no cross-examination because she is dead, still the law permits you to examine that evidence. It is in the nature of a dying declaration. Examine that evidence and if you are satisfied beyond reasonable doubt, accept what has been stated there. Do not forget that there was no other witness to the incident and the deponent herself is not before you, the law regards her statement as evidence in regard to the cause of death, and the circumstances which led to her death."

In our opinion this direction only instructed the Jury that they could act upon the deceased's statement. But there was no caution as to the risk of acting upon the statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate. Connected with this omission there was the failure to direct the Jury that, even if the appellant caused the death of his wife by administering some liquid, the burden lay on the prosecution to exclude the possibility of an accidental administration, *Thuraisamy* v. *The Queen*, 54 N.L.R. 449. The Jury could thus have had the impression that the possibility of an accidental administration could be excluded merely by reason of the failure of the accused to give evidence. A direction that the Crown must prove the guilt of the accused beyond reasonable doubt did not in these circumstances suffice to explain the particular burden which rested on the prosecution in this case.

In our opinion the denial to the Defence of a proper opportunity to meet the evidence of Dr. Amarasekera, and the omission from the charge to the Jury of requisite directions concerning the statements made by the deceased woman and the possibility of accident, have led to a miscarriage of justice. We are not disposed in all the circumstances to order a new trial. We set aside the conviction of the appellant and the sentence passed on him and we direct a verdict of acquittal to be entered.

Accused acquitted.

Present : **Alles, J.**

HAJI MOHAMED ISMAIL *vs.* S. L. M. M. SHERIFF

S.C. No. 127/1964 (*R.E.*)—*C.R. Colombo, No.* 86331.

Argued on : 6th July, 1965.
Decided on : 16th July, 1965

Landlord and tenant—Duration of monthly tenancy—Notice to quit—Validity of such notice.

Held : (1) That a monthly tenancy is tacitly renewed at the end of each monthly period unless the contrary is expressed, by the lessor or lessee.

(2) That where a monthly tenancy is to be terminated, a calendar month's notice is deemed "reasonable notice".

(3) That such notice must run concurrently with a term of the letting and hiring and expire at the end of such term.

(4) That where a notice to quit relates to a date after the exact date on which a tenancy terminates, a fresh tenancy automatically commences at the cessation of the previous tenancy and before the coming into operation of the notice which then becomes invalid.

Authorities cited : *Landlord and Tenant in South Africa*, Wille, 5th. Ed.

Cases referred to : *C. R. Colombo* 87694, (1873) Grenier's Reports, (Part II), p. 23.
Fonseka v. *Jayawickrema*, (1892) 2 Cey. Law Reps. 134 ; 1 S.C.R. 352.
Warwick Major v. *Fernando*, (1917) 4 C.W.R. 221.
Loku Menike v. *Charles Singho*, (1918) 5 C.W.R. 281.
Peiris v. *Savundranayagam*, (1951) 52 N.L.R. 406.
Abdul Hafeel v. *Muthu Bathool*, (1957) 58 N.L.R. 409.
Edward v. *Dharmasena*, (1964) 66 N.L.R. 525 ; LXVII C.L.W. 44.
Zahir v. *David Silva*, (1957) 61 N.L.R. 357 ; LVII C.L.W. 82.

Not followed : *Weeraperumal* v. *Dawood Mohamed*, (1898) 3 N.L.R. 340.
Imperial Tea Co., Ltd. v. *Aramady*, (1923) 25 N.L.R. 327; 5 Cey. Law Rec. 138; 2 Times L.R. 44.
Simmons v. *Crossby*, (1922) 2 K.B. 95 ; 91 L.J.K.B. 643 ; 127 L.T. 337 ; 38 T.L.R. 571.

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C. Ranganathan, for the defendant-appellant.

S. Sharvananda with *M. T. M. Sivardeen*, for the plaintiff-respondent.

ALLES, J.

I do not propose to disturb the finding of the learned Commissioner who has held in favour of the plaintiff that the premises in suit were reasonably required for occupation as a residence for the plaintiff's daughter. I think, however, that the learned Commissioner has come to an erroneous conclusion on the law with regard to the validity of the notice to quit. This was a monthly tenancy commencing on the first of the month ; the notice to quit was given on 11th May, 1963, requiring the tenant to quit the premises in question on the first day of July, 1963, and the notice informed the tenant that the tenancy was terminated on 1st July, 1963, and that he was required to give vacant possession of the premises on that day—(*vide* notice marked P 2). Counsel for the defendant at the trial raised the issue as to whether the notice given by the plaintiff was valid in law. It was Counsel's submission at the trial that the tenancy should have terminated at midnight on 30th June, 1963, and not on 1st July, 1963. The learned Commissioner following certain decisions of this Court has held that the notice was valid and given judgment in favour of the plaintiff. The validity of the notice has been canvassed before me and in my view, the submission of Counsel for the defendant-appellant that the notice is bad is entitled to succeed.

The contract of letting and hiring (*locatio conductio*) is governed by Roman-Dutch law. Wille in his book " Landlord and Tenant in South Africa " (5th Edn.), at p. 45 says :

> " Leases of this nature are known as weekly, monthly, or yearly tenancies, respectively, or they may be styled periodic leases or tenancies . . . The essence of a periodic tenancy is, under the common law, that it continues for successive periods until it is terminated by notice, given by either party."

Again he says,

> " In the absence of agreement or custom as to the length of the notice, reasonable time in the case of a monthly tenancy is a month, and the notice of termination must be given so as to expire at the end of a monthly period, for a monthly lease runs from month to month, and not for broken periods. "

He proceeds on the same page to make this observation :—

> " If the tenancy commences on the first day of a calendar month, the month's notice may be given at any time on the first day of a subsequent month and it is effective to terminate the lease at the end of that month."

These principles have been accepted by our Courts as far back as 1873 when Creasy, C.J., said in a case reported in Grenier's Reports, (1873) Part II, p. 23, at 24 :

> " I think . . . that the notice must be one commensurate with the term for which the letting was, that is a month for a month ; and I also think that it must be a notice expiring at the expiration of a current month after the date of the notice."

Subsequent decisions of the Supreme Court have followed this view—*Fonseka* v. *Jayawickrema*, (1892) 2 Ceylon Law Reports, 134, at 135 ; *Warwick Major* v. *Fernando*, (1917) 4 C.W.R. 221 ; *Loku Menike* v. *Charles Sinno*, (1918) 5 C.W.R. 281 ; *Peiris* v. *Savundranayagam*, (1951) 52 N.L.R. 406 ; and *Abdul Hafeel* v. *Muttu Bathool*, (1957) 58 N.L.R. 409, at 410 and 411. In *Warwick Major* v. *Fernando* (*supra*), de Sampayo, J., said :

> " It is well settled that a monthly tenant is entitled to a month's notice, and the time from which the month should be calculated would depend on the commencement of the tenancy."

De Sampayo, J's. view was approved of by Shaw, J., in *Loku Menike* v. *Charles Sinno* (*supra*). The learned Judge makes references to the decisions in the South African Courts and to Wille's treatise on Landlord and Tenant and concludes by saying that in view of the law as it is administered under the Roman-Dutch common law in South Africa he must hold that the notice must be a monthly notice terminating at the end of a current month of the tenancy and that, therefore, the notice given by the landlord to his tenant on the 18th of April to quit on the 18th of May was bad. *Abdul Hafeel* v. *Muttu Bathool* was a decision of two Judges. In that case, Basnayake, C.J., held that—

> " A lease for a period not exceeding one month commonly known as a monthly tenancy is renewed each month by tacit agreement. Such tacit renewal of leases is known to Roman-Dutch Law."

The learned Chief Justice further states—

> " In a monthly tenancy the lease is tacitly renewed on the first day of each month by the lessor not indicating to the tenant before that day that he wants to terminate

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the lease and the lessee remaining in the house without notifying the lessor that he proposes to quit. The terms of removal must be taken to be the same each month unless they are changed by mutual agreement . . . So the law requires that reasonable notice should be given of non-renewal of tenancy even if the lease expires at the end of each month. Our practice that the landlord or the tenant may terminate the tenancy or in the language of our common law, the letting or the hiring, as the case may be, in the case of a monthly tenancy upon a month's notice terminating on the date on which the period of tenancy expires is based on this requirement of the Roman-Dutch Law."

He cites Voet, Book XIX, Tit. 2, S. 10, (Gane's translation) and Van Leeuwen (*Censura Forensis*, Book IV, Ch. XXII, S. 14), in support of the above propositions. He then continues to say that " in the case of monthly tenancy there is no difficulty in determining the period for which the lease is tacitly continued ".

What then is the nature of the notice in the instant case ? The notice was issued on 11th May, 1963, requiring the tenant to quit on 1st July, 1963. The notice has been given before the due date from which it operates and the notice would run from 1st June, 1963, until midnight of 30th June, 1963, (*vide Edward* v. *Dharmasena*, 66 N.L.R. 525). At midnight, a new tenancy on the same terms and conditions would have commenced which would expire at midnight on 31st July, 1963. According to the notice in the present case, a new tenancy was created from midnight on 30th June, 1963, to midnight on 1st July, 1963, (a broken period), a tenancy which is not recognised by the Roman-Dutch Law. Even when the monthly tenancy commences on a date other than the first, the notice to be valid should be a monthly notice. For instance, if a tenancy commenced on the 15th of a month, a notice requiring a tenant to quit on any day other than the 14th of the subsequent month or the 14th of any month thereafter would be a bad notice.

The view that has been accepted by the learned Commissioner in this case regarding the validity of the notice finds support in a decision of Bonser, C.J., in *Weeraperumal* v. *Davood Mohamed*, (1898) 3 N.L.R. 340, where the learned Chief Justice said—

" As I understand the law, no notice of any definite length of time is required. It must be a reasonable notice—reasonably sufficient in the opinion of the Judge to admit of a tenant having an opportunity of securing another house. A month's notice has been in several cases considered reasonable, and in this case the tenant had more than a month's notice."

Although the views of Bonser, C.J., were disapproved by de Sampayo, J., in *Warwick Major* v. *Fernando*, this view found favour with Jayawardene, A.J., in *Imperial Tea Co., Ltd.* v. *Aramady*, (1923) 25 N.L.R. 327, at 330. The learned Judge reviewed all the previous authorities and accepted the principle laid down in a Divisional Bench of the High Court of England (Swift and Acton, JJ.), in *Simmons* v. *Crossley*, (1922) 2 K.B. 95. There Swift, J., said :

" I think that to determine a monthly or weekly tenancy reasonable notice must be given, and that such notice, if in other respects reasonable, is not rendered unreasonable and invalid merely because it expires on some day other than the last day of the month or week calculated from the commencement of the tenancy."

While practical considerations may favour the views expressed by Bonser, C.J., in *Weeraperumal* v. *Davood Mohamed* and Jayawardene, A.J., in *The Imperial Tea Co., Ltd.* v. *Aramady*, the principles of the English law have no application to a contract of tenancy, which is governed by the Roman-Dutch law. If in this case, the doctrine of reasonableness is adopted as the standard, it will necessarily follow that the law would have to recognise a tenancy for a broken period and this would be in direct conflict with the principles of the common law. I, therefore, prefer to adopt the principles of the common law as recognised by de Sampayo, J., in *Warwick Major* v. *Fernando*, Shaw, J., in *Loku Menike* v. *Charles Sinno* and Basnayake, C.J., in *Abdul Hafeel* v. *Muttu Bathool*, which is based on sound common sense and ensures certainty and finality in the nature of the notice. In contradistinction the question whether a notice is reasonable or not is one that is bound to vary with the idiosyncrasies of the individual Judge. I, therefore, hold that the notice given in this case is not in conformity with the law, and is not valid a notice. I am fortified in this view by the decision of Basnayake, C.J., in *Zahir* v. *David Silva*, (1959) 61 N.L.R. 357, at 359, where the learned Chief Justice said :

" It is settled law that in the absence of an agreement to the contrary the notice of termination of a tenancy must run concurrently with a term of the letting and hiring and must expire at the end of that term."

The appeal is, therefore, allowed with costs.

Appeal allowed.

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Present : **T. S. Fernando, J., and Tambiah, J.**

K. RAMANATHAN *vs.* L. H. PERERA & OTHERS

S.C. 45/59 (F)—D.C. Colombo, Case No. 760/ZL.

Argued on : 24th November, 1961.
Decided on : 16th January, 1962.

Civil Procedure Code, section 218—Clause (k) in proviso to this section—Meaning of term "contingent right" contained therein.

The question for determination in the present case was whether a certain property could be seized and sold as against the judgment-debtor, one *R*. The position taken up by *R*. was that his interest in the property was not seizable in terms of section 218 (*k*) of the Civil Procedure Code as it had not vested but was merely contingent. *R*. derived his interest in the property in terms of Last Will, No. 147, executed by his grandfather. The said Will created a trust, *R*. being one of the beneficiaries, and also it provided *inter alia* that these beneficiaries were not entitled to receive the income arising from their shares until the trust ceased as provided by the Will.

Held : (1) That the term *contingent right* in section 218 (*k*) of the Civil Procedure Code means a right which is conditional as contrasted with a vested right which is a certain or assured right.

(2) That on a reading of the Last Will which created a trust it was clear that the beneficial interest vested in *R*. during the continuance of the trust, its enjoyment only being postponed until the death of the last of the trustees. The said interest of *R*. was, therefore, not a contingent interest within the meaning of section 218 (*k*).

Cases referred to : *Babui Rajeshwari Kuer* v. *Babui Khukhna Kuer and Another*, (1943) A.I.R., P.C. 121.
Jewish Colonial Trust, Ltd. v. *Est. Nathan*, (1940) A.D. 163.
Mohammed Bhoy v. *Lebbe Maricar*, (1912) 15 N.L.R. 466.
Silva v. *Silva*, (1927) 29 N.L.R. 373 ; 9 Cey. Law Rec. 56
Gunatilleke v. *Fernando*, (1921) 22 N.L.R. 385 ; 3 Cey. Law Rec. 99

H. V. Perera, Q.C., with *M. S. M. Nazeem* and *M. T. M. Sivardeen*, for the plaintiff-appellant.

C. Ranganathan with *S. C. Crossette Tambiah*, for the defendants-respondents.

TAMBIAH, J.

The defendants in this case filed case No. 14719/S in the District Court of Colombo against one Rajendram and, having obtained decree, they seized the land described in the schedule to the plaint. The present plaintiff, who purports to be one of the trustees under a last will left by the grandfather of the said Rajendram, made a claim before the District Court but his claim was dismissed by that Court. The plaintiff thereupon filed the present action under section 247 of the Civil Procedure Code in which he asked for a declaration that the property, which has been the subject-matter of seizure, is not a seizable interest as it is exempted by the provisions of section 218/*k*) of the Civil Procedure Code.

Section 218 (*k*) of the Civil Procedure Code, (Cap. 101 of the Revised Legislative Enactments, 1956 Ed.) gives the right to the judgment-creditor to seize and sell or realise in money by the hands of the Fiscal "all saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which the judgment-debtor has a disposing power, which he may exercise for his own benefit, and whether the same be held by or in the name of the judgment-debtor or by another person in trust for him or on his behalf". The proviso to this section exempts certain classes of property from seizure or sale, One of the exempted classes of property is "an expectancy of succession by survivorship or other merely *contingent* or possible right of interest" (*vide* section 218 (*k*) of the Civil Procedure Code). The learned District Judge has held that the property in question does not fall within the ambit of section 218 (*k*) of the Civil Procedure Code and, therefore, is liable for seizure or sale. The plaintiff has appealed from this order.

The question for determination is whether the interest, which Rajendram has in the property in question, is a contingent or a vested right within

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the meaning of section 218 (*k*) of the Civil Procedure Code. The Indian Civil Procedure Code contains a similar provision as section 218 and it is, therefore, relevant to consider the distinction drawn between a contingent interest and a vested interest by Their Lordships of the Privy Council in construing the corresponding section of the Indian Civil Procedure Code. In *Babui Rajeshwari Kuer* v. *Babui Khukhna Kuer and Another*, (1943) A.I.R. (P.C.), p. 121, a testator, who had no male issue, provided in his will that after his death, his wife should become proprietor having life interest only of all his properties. The will then proceeded as follows : " (4) On the death of my wife the whole of my estate being treated as 16 annas right, 3 as. and odd out of it shall pass into the possession of the daughter-in-law but she shall not have the right to transfer the same, 12 annas share shall pass into the possession of the two daughters born of the womb of my daughter *who are still living* in equal shares, *i.e.*, each will get 6 annas share and 1 anna share shall pass into the possession of the sister-in-law as absolute proprietors having the right to alienate, etc., the property ". The will also had other provisions which are not relevant to this case. The question arose as to whether the grand-daughters, to each of whom half the property had been left by will, had a contingent or a vested interest within the meaning of section 61 of the Indian Civil Procedure Code. The contention of the appellant that, on a proper construction of the will, the interest of the grand-daughters was contingent on the survival of the widow, was based on the clause " who was still living ". It was argued that these words are equivalent to " who shall be still living " and, therefore, the grand-daughters only succeeded if they happened to survive the wife of the testator. Their Lordships of the Privy Council rejected this contention and held that the interest of the grand-daughters was a vested one and not a contingent one. Clause (6) of the will provided that " if for any reason God forbid, any portion of the said estate is not taken possession of by my daughter's daughters and the sister-in-law and they do not get the opportunity of entering upon possession and occupation of it, the entire estate will remain in my daughter-in-law's possession without the right of transfer and on her death the entire estate shall be treated as my estate with the District Magistrate and Collector of Saran as its manager and trustee ". Referring to this clause, Their Lordships observed that the most that can be said is that this clause is intended, in certain events, to divest the interest which before those events have already become vested.

The term " contingent " right in section 218 (*k*) of the Civil Procedure Code means a right which is conditional as contrasted with a vested right which is a certain or assured right. When the word " vested " is used in this sense, Austin (Jurisprudence, vol. 2, lect. 53), points out that in reality a right of one class is not being distinguished from a right of another clause but that *a right is being distinguished from a chance or possibility of a right*, but it is convenient to use the well-known expressions vested right and conditional or contingent right (*vide* also *Jewish Colonial Trust Ltd.* v. *Est. Nathan*, (1940) A.D. 163, at 176, *per* Watermeyer, J.A.).

Our Courts have also considered the meaning of the terms " contingent " and " vested " in dealing with properties which are burdened with a *fideicommissum*. In *Mohammed Bhoy et al.* v. *Lebbe Maricar*, (1912) 15 N.L.R. 466, it was held that the interests of a *fideicommissarius* cannot be sold in execution during the lifetime of the *fiduciarius* as it is a contingent interest within the meaning of section 218 (*k*) of the Civil Procedure Code where such an interest was created by will and contained the condition that, on the death of the *fiduciarius*, the property should pass to the *fideicommissarius*. The interest of the *fideicommissarius*, in this case, was " *expectant on his surviving his father* ". In *Silva* v. *Silva*, (1927) 29 N.L.R. 373, a deed of gift created a *fideicommissum* in which the *fideicommissary* succeeded to the property after the death of the *fiduciary*. It was held that the former acquired " an assured and certain interest " which was liable to be seized and sold under section 218 (*k*) of the Civil Procedure Code. Under the Roman-Dutch law, there is a distinction between a *fideicommissum* created by deed and a *fideicommissum* created by will. Where a *fideicommissum* is created by deed, the *fideicommissary* has an assured interest which he could alienate even if he happens to die before the fiduciary.

In *Gunatilleke* v. *Fernando*, (1921) 22 N.L.R. 385, at 393, Lord Phillmore, delivering the opinion of the Privy Council, equated contingent interest to " *spes* ". He said (*vide* 22 N.L.R., at page 38)—

> " But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to Their Lordship's notice. No doubt the *spes* which such a remainder-man can alienate is a

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very shadowy one, for if he predeceases the fiduciary, his heirs takes nothing, and, therefore, the alienee could take nothing."

In the instant case, the question is whether, on a true construction of Last Will, No. 147, executed by Sathappa Chetty Kalimuttu Chetty, Rajendram, who is one of his grandsons, had a vested interest or merely a contingent interest. It was contended on behalf of the appellant that Rajendram's interest only vested if he happened to survive the last of the trustees. It was also contended that the trust operated during the subsistence of the will and that Rajendram had no right to the property or to the income thereof, and consequently, he had only a contingent interest.

The counsel for the respondent, on the other hand, submitted that Rajendram had a vested interest but the beneficial enjoyment of his share of the property was postponed till the last of the trustees died. He also contended that during the pendency of the trust, the trustees were empowered to perform certain functions and duties which did not militate against the vesting of the rights of Rajendram.

Sathappa Kalimuttu Chettiar, after executing Last Will No. 147 of 20th August, 1938, executed two other codicils. The terms of the codicils are irrelevant in determining the question at issue in the instant case. The testator, who executed this Will, was possessed not only of this land but also of several other properties and he had eight children by two marriages. By the first bed, he had Sellatchi, Vettivel, Muttukaruppan and Periya Ponnatchi, and, by the second bed, he had Sinna Ponnatchi, Thevagnanasekaram, Ramanathan and Nagendra. Of these eight children, seven of them had married and had children of their own. Nagendra was a minor and was unmarried at the time Kalimuttu Chettiar wrote his last will. Rajendram, the judgment-debtor in the case mentioned, was one of three children of Kalimuttu's son, Vettivel, by the first marriage.

The recital to the last will states that the testator is desirous of dividing his property among the grandchildren in the proportions : 1/2-share to the children of Muttukaruppan, Periya Ponnachi, Thevagnanasekeram and Ramanathan, respectively, and 1/2-share to his son, Nagendra. The last will states that the devisees will be called as donees or beneficiaries in the proportions set out in the last will, and subject to the conditions and restrictions and reservations, the child or children of any of the above take by representation, the share his or her parent would be entitled to. The will also states that *the children of Vettivel, Rajendram, Somasunderam and Sandanam are entitled to an undivided 1/2-share of the capital and income of all the immovable and movable property in Schedule A and B.*

The testator devises and bequeaths the properties contained in the schedule to the will to his trustees upon trust subject to the conditions, restrictions and reservations and, for the purposes set out in the will. The will further states that, for these purposes, the trustees shall be vested with title to the said property immediately after his death and shall stand seized and possessed of the same for the purposes of executing and carrying out all the purposes of the trust. Among the conditions set out are that *the donees should not mortgage, sell or alienate their shares* but that, after their death, the same shall devolve on their lawful heirs, subject to the proviso that *should the necessity arise they could sell, alienate or mortgage their shares among themselves.* The will also provides that the donees are not entitled to receive the income arising from their shares until the trust ceases as provided by the will. The donees are also prohibited from selling, mortgaging or alienating their rights to the said income and any such act on their part is to make the share of such donees liable for forfeiture at the sole and absolute discretion of the trustee or trustees. The forfeited share should then devolve on the brothers and sisters of the said donees and, failing them, it should devolve on the other donees. The trust should terminate with the death, incapacity or refusal to act of the last surviving of the original trustees. The trustees are given the power of management of the testator's business and the properties. They are also given power of investment, power to make advances and certain other powers.

On a reading of this last will, it is clear that the legal title to the property, which is the subject-matter of this action, vested in the trustees during the continuance of the trust and the beneficial interest is vested in the beneficiaries, of whom Rajendram is one, but the enjoyment of the beneficial interest is postponed till the death of the last of the trustees. In view of the clear words in the last will vesting defined shares in the donees and the prohibition of alienation to outsiders, it cannot be said that the interest of Rajendram is only a contingent one and not an assured and vested interest.

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The counsel for the appellant further contended that the clause which provides that the child or children of any of the donees take by representation the share of his or her parents, shows that the interest of the donee was only a contingent one. We are unable to agree. This clause, in our view, only provides for the substitution of the children to the interest which has already vested in the donees in the event of the death of the donees.

For these reasons, we hold that the judgment of the learned District Judge should be affirmed and we dismiss the appeal with costs. Application No. 323 of 1960 presented by the plaintiff seeking a revision of the same judgment of the District Judge is also dismissed.

Appeal dismissed.
Application refused.

Present : **Manicavasagar, J.**

K. CHANDRASEKERA *vs.* JAYANATHAN, S.I. POLICE & ANOTHER

Application for revision in Jt. M.C. Colombo, No. 26994.
(*S.C. Application, No.* 217/64).

Argued on : 22nd October, 1964.
Decided on : 29th October, 1964.

Criminal trespass, Charge of—Fiscal ejecting the accused from certain premises on writ issued by Court and delivering key to plaintiff's agent—Agent entrusting the premises to J. during his temporary absence—Accused entering premises by pushing aside J. and forcing open padlock—Acquittal of accused on the ground that J. was not in occupation of the premises—Penal Code, section 434.

On a writ issued by Court in a tenancy action, the Fiscal ejected the accused from certain premises by putting out his belongings, padlocking the door and delivering the key to an agent of the landlords. The agent left to have his lunch entrusting the premises to *J.* Shortly after, the accused entered the premises by pushing aside *J.* and forcing open the padlock. *J.* immediately complained to the police, who prosecuted the accused for committing criminal trespass. The magistrate acquitted the accused on the ground that *J.* was not in " occupation " of the premises within the meaning of that word in section 434 of the Penal Code. On an application under section 356 of the Criminal Procedure Code by the landlord, who was the aggrieved party, to revise the said order—

Held : That the fact that *J.* was actually present and in charge on behalf of his principal " to control as to who has rights of ingress and egress to the premises ", is sufficient to constitute " occupation " within the meaning of section 434 of the Penal Code.

Cases referred to : *Nallan Chetty* v. *Mustafa,* (1916) 19 N-L-R- 262 ; 2 C.W.R. 6
The King v. *Selvanaygam,* (1950) 51 N.L.R. 470 ; XLIII C.L.W. 101
Silva v. *Silva, et al.,* (1929) 10 C.L. Rec. 107 ; 7 Times of Ceylon L. R. 32
Speldewinde v. *Ward,* (1903) 6 N.L.R. 317

Per MANICAVASAGAR, J.—"..........one can be said to be in occupation, even though he may have closed up the premises and gone on a holiday ; actual presence at the time of the trespass is not a necessary element. This was the ratio decidendi in the two cases cited by the petitioner. "

M. M. Kumarakulasingham with *R. L. Jayasuriya,* for the petitioner.

Aelian Pereira, for the accused-respondent.

P. Colin Thome, Crown Counsel, for the complainant-respondent.

MANICAVASAGAR, J.

In this case the accused-respondent was charged with the offence of house-trespass by entering, on 27th March, 1963, premises 41 and 41A, Galle Road, Kollupitiya, which were in the occupation of P. G. Jamis Perera, with intent to cause annoyance to him. The prosecution was at the instance of the police.

The respondent was acquitted of the charge by the magistrate who accepted the evidence of the witnesses for the prosecution, and rejected the evidence of the respondent as being false, bu

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held that there was no evidence that at the time of the trespass the premises were in the occupation of Jamis Perera.

The matter is before me on an application, under section 356 of the Criminal Procedure Code, by Chandrasekera who is dissatisfied with the decision of the magistrate. Chandrasekera gave evidence for the prosecution : he is the lessee and landlord of the premises which the respondent is alleged to have trespassed upon, he is interested in the prosecution, and is an aggrieved party.

On the facts found by the magistrate, and I see no reason whatsoever to disagree with his findings on the facts, the respondent came into occupation of the premises as tenant of Chandrasekera ; he was ejected on 27th March, 1963, from the premises by the Fiscal on a writ issued by order of the Court in C.R. 78860, which was an action for rent, and ejectment brought by Chandrasekera against the respondent ; the Fiscal put out the belongings of the respondent who was present a part of the time, padlocked the door, and delivered the key to Dharmadasa, agent of Chandrasekera ; at noon Dharmadasa left to have his lunch leaving Jamis Perera in charge : during this period the respondent entered the premises by pushing Jamis Perera aside and forced open the padlock. Jamis Perera complained at once to the police and the respondent was prosecuted and eventually acquitted of the charge.

The magistrate took the view that Jamis Perera was not in occupation of the premises within the meaning of the word " occupation " used in section 434 of the Penal Code under which he was charged ; he said that " occupation would mean some manner of living in the premises with a degree of control as to who has rights of ingress and egress to the premises " ; in other words he meant that occupation should be the actual physical occupation of a resident at the time of the trespass.

The term " occupation " has been the subject of interpretation by this Court. I shall refer firstly to two cases on which Counsel for the respondents relied. In *Nallan Chetty* v. *Mustafa*, 19 N.L.R. 262, the accused and his mother who were the owners of certain premises were ejected by the Fiscal in a suit brought by their lessee ; the premises were thereafter unoccupied and vacant for about two months during which time the accused had sent some workmen to effect repairs to the premises which he was obliged to do under the lease. The accused was charged with criminal trespass and acquitted. Sampayo, J., on an application for revision, refused to intervene because the entry was lawful ; in his judgment he expressed the opinion that occupation was something more than possession ; he said it seemed to imply actual physical possession through oneself or through an agent.

In *Selvanayagam's case* decided by the Privy Council, and reported in 51 N.L.R. 470, the facts were that Selvanayagam was, and before him his parents, and grand-parents, had been in continuous occupation of two rooms on an estate for about 70 years ; he had been noticed on behalf of the Government to quit, the latter having taken over the estate ; he refused to do so and was charged with criminal trespass. Their Lordships in acquitting the accused from his conviction and sentence, said that the necessary intention to constitute the offence of criminal trespass was absent, and also expressed the view that occupation is a matter of fact, while possession may be actual or constructive, and said " this section has no application where the fact of occupation is constant, the only charge being one of character, as where a tenant holds over after the expiration of the tenancy ".

Both these cases take the view that occupation should be physical, and in the words of Sampayo, J., it may be by oneself or through one's agent ; neither decision justifies the view that occupation means residence over a period of time, or residence, in fact, at the time of trespass ; it can well be temporary, may be even for a few hours ; one can be said to be in occupation, even though he may have closed up the premises and gone on a holiday ; actual presence at the time of trespass is not a necessary element. This was the *ratio decidendi* in the two cases cited on behalf of the petitioner.

In *Ward's case*, reported in 6 N.L.R. 317, a decision by two Judges of this Court, the Fiscal ejected the accused from a plot of patna and scrub land and delivered it to an agent of the Secretary of State for War, who took possession ; after a month the agent left leaving no one in occupation ; the accused re-entered, and his conviction for criminal trespass was affirmed. Maartensz, J., in the later case of *Silva*, reported in 10 C.L.R. 107, quoted *Ward's case* with approval, holding that occupation does not mean actual physical possession ; with respect, I agree with this opinion.

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In the case now before me the agent was actually present and in charge ; he was certainly not in residence, but he was there on the land on behalf of the principal, to use the language of the magistrate, to control as to who has rights of ingress and egress to the premises ; this, in my view, constitutes occupation as contemplated by the section.

Counsel for the accused-respondent submits that there was no finding by the magistrate that the accused's intent was to annoy, and, therefore, this Court ought not to interfere with the acquittal. Intention is a matter of inference, and the facts established clearly point to an intent to annoy and may well have led to a breach of the peace ; indeed, the magistrate accepts Jamis Perera's evidence that he was pushed aside by the respondent and he was annoyed by this.

The magistrate has, in my opinion, erred on the law, and his acquittal of the respondent has resulted in a positive miscarriage of justice. I set aside the order of acquittal, and convict the accused-respondent of the charge. The case record will go back to the magistrate for sentence ; he should, in imposing punishment, take into consideration whether the accused is in occupation of the premises or not.

Acquittal set aside and accused convicted.

Present : **Abeyesundere, J., and Alles, J.**

AINES *vs.* SALMAN APPUHAMY & ANOTHER

S.C. 588/1963—*D.C., Balapitiya, No.* 565/*NP.*

Argued and decided on : April 9, 1965.

Partition Act (*Cap.* 69), *section* 2—*Two plaintiffs—One entitled to dominium as regards a share only and the other to a usufruct in respect of that share—Action for partition instituted by said two plaintiffs—Is either competent to maintain action ?*

Where two plaintiffs, one of whom is entitled only to the dominium to an undivided share of a land and the other to the usufruct thereof, institute an action under the Partition Act—

Held : That neither of them is competent to be a plaintiff in view of section 2 of the Partition Act.

Case referred to : *Charlis Appu* v. *Dias Abeysinghe*, 35 N.L.R. 323.

H. Wanigatunga, for the 80th defendant-appellant.

A. C. Nadarajah with *Y. C. David*, for the plaintiffs-respondents.

ABEYESUNDERE, J.

In this partition action there are two plaintiffs, The second plaintiff has the dominium in respect of an undivided share of the *corpus* sought to be partitioned and the first plaintiff has the usufruct in respect of that share. The 80th defendant who has appealed against the interlocutory decree entered in this action submits that two persons who are not competent to be plaintiffs under section 2 of the Partition Act have instituted this action. Mr. H. Wanigatunga who appeared for the 30th defendant at the hearing of the appeal argued that under the said Act only a person who had both ownership and possession of a land or ownership and the right to possession thereof was entitled to be a plaintiff in a partition action in respect of that land. The view expressed by counsel for the 80th defendant finds support in the decision of this Court in the case of *Charles Appu* v. *Dias Abeysinghe*, reported in 35 N.L.R., page 323. In that case it was held by this Court that a person who was entitled to the dominium only of an undivided share of a land, the usufruct being vested in another, was not entitled to bring a partition action.

In the present action, as the second plaintiff has only the dominium and the first plaintiff has only the usufruct in respect of an undivided share of the *corpus*, I hold that neither of them is competent to be a plaintiff. In view of this finding the appeal must succeed. I set aside the judgment and decree entered by the learned District Judge and dismiss the action of the plaintiffs. The appellant is entitled to his costs of the appeal.

ALLES, J.

I agree.

Appeal allowed.

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Present : **Abeyesundere, J., and G. P. A. Silva, J.**

D. P. DAHANAYAKE & ANOTHER *vs.* D. W. ALAHAKOON & OTHERS

S.C. No. 14/64—*D.C. Matara,* 20832/*P.*

Argued and decided on : 2nd July, 1965.

Partition Ordinance, (*Cap.* 56, *Legislative Enactments,* 1938 *Ed.*), *section* 5—*Commission issued to surveyor to partition land—Requirement of* 30 *days' notice in proviso to section* 5—*Whether an imperative provision—Effect of non-compliance therewith.*

After decree of partition had been entered in the present case, commission was issued under section 5 of the Partition Ordinance to a surveyor to prepare a scheme of partition. The proviso to section 5 requires the Commissioner who has to prepare such scheme to give at least 30 days' notice before making the partition. It was clear from the record of the case that such notice had not been given. The present appeal was from the order made by the District Judge after inquiry into the scheme of partition prepared by the Commissioner.

It was submitted on behalf of the appellants that this provision regarding notice was an imperative provision. This was a point raised in appeal for the first time and had not been raised at the inquiry before the learned District Judge.

Held : (1) That the Commissioner had not executed his commission according to law inasmuch as he had failed to comply with the provisions of the proviso to section 5 of the Partition Ordinance.

(2) That, therefore, the order appealed from should be set aside and a fresh commission issued in terms of section 5.

N. S. A. Goonetilleke, for the plaintiffs-appellants.

H. Wanigatunga with *H. L. Karawita,* for the 37th to 43rd defendants-respondents.

ABEYESUNDERE, J.

This partition action was instituted under the now repealed Partition Ordinance. After the decree of partition was entered, the Court under section 5 of the said Ordinance issued a commission dated 26th February, 1962, addressed to Mr. E. W. Jayasuriya, Licensed Surveyor of Matara, authorising and requiring him to make partition of the land. The proviso to the said section 5 requires the Commissioner, at least 30 days before making the partition, to affix on some conspicuous part of the land to be partitioned a written notice of the day on which the partition is proposed to be made and give further notice thereof by beat of tom tom in the village or place where such land is situated and in such other manner as shall appear best calculated for giving the greatest publicity thereto.

Mr. N. S. A. Goonetilleke, who appeared for the appellants, argued that the said proviso contained an imperative provision which had to be complied with by the Commissioner if his commission was to be executed in accordance with the law. Although this point was not raised at the inquiry held for the purpose of adopting or modifying the scheme of partition submitted by the Commissioner, it is evident on a reference to the record of this case that Mr. Goonetilleke's statement in regard to the non-compliance by the Commissioner with the relevant provision of the law is correct. As stated earlier, the commission is dated 26th February, 1962, and the Commissioner arrived on the land for the purpose of considering the scheme of partition on 16th March, 1962, and his Plan No. 75 is dated 25th March, 1962. Therefore, 30 *days* could not have elapsed from the date of the commission before the Commissioner arrived on the land and thereafter prepared his plan. I hold that the Commissioner has failed to comply with the provisions of the proviso to section 5 of the said Ordinance and

* For Sinhala translation, see Sinhala section, Vol. 10 part 4, p. 15.

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that, therefore, he has not executed his commission in accordance with the law.

For the aforesaid reasons, I set aside the order appealed from and direct that a fresh commission be issued under the said section 5 and that the Commissioner to whom such fresh commission is issued, shall, in preparing his scheme of partition, have regard to the need for giving road frontage to all the co-owners, if it is feasible to do so.

Since the aforesaid failure to comply with the provision of the law is not due to any lapse or negligence on the part of the respondents to the appeal, I think that the appellants should not be awarded any costs of appeal

G. P. A. Silva, J.

I agree.

Appeal allowed.

Present : **Manicavasagar, J.**

THE SOLICITOR-GENERAL *vs.* M. PODISIRA

S.C· No. 189/65—*M.C. Badulla, No.* 4543.

Argued on : 23rd August, 1965.
Decided on : 27th August, 1965.

Evidence—Opinion of expert witness—Failure to elicit facts showing special skill for the purpose—Bare opinion not sufficient—Burden on prosecution—Duty of Court to satisfy itself that witness is an expert, even where prosecution fails to discharge its burden.

On a charge of selling Government Arrack without a licence from the Government Agent, the prosecution led the evidence of a Preventive Officer who identified the arrack in the following terms : " I examined the contents of the bottle . . . I am of opinion that it contained Government arrack. "

Not a question was put to him either in cross-examination or by the Magistrate in regard to this opinion. At the conclusion of the trial the Magistrate acquitted the accused on the ground that this witness who identified the arrack did not give any reasons as to how he came by his opinion.

The Solicitor-General appealed and it was contended on his behalf that the Magistrate should have accepted the opinion of this witness, once he had satisfied himself that he was competent to testify as an expert unless his opinion had been demonstrated to be unreliable.

Held : (1) That the burden lay on the prosecution to elicit relevant material in order to satisfy the Court that this witness was an expert.

(2) That as the prosecution failed to discharge this burden it was the right and duty of the Magistrate to question him in order to satisfy itself that the witness is specially skilled on the subject on which he was called to testify.

(3) That in the circumstances of this case the acquittal of the accused was justified.

Per Manicavasagar, J.—" The witness should have been questioned in regard to his experience, the special skill which he claimed to have acquired, the number of instances where he had given his opinion as an expert in Court or else where, the number of cases and the period during which he had testified in Court, and whether there were any cases where his opinion had not been accepted."

V. S. A. Pullenayagam, Crown Counsel, for the complainant-appellant.

No appearance for the accused-respondent.

Accused-respondent absent.

Manicavasagar, J.

The accused-respondent was acquitted at the conclusion of the trial on the charge of selling an excisable article, namely, Government arrack, without a licence from the Government Agent, Badulla District, to Police Constable 549 Ayupala. The Magistrate in his judgment said that Gurudevan, the Preventive Officer, who identified the article as Government arrack did not give any

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reasons as to how he came by his opinion. The Solicitor-General appeals from the order of the Magistrate.

The accused-respondent was not present at the hearing, nor was he represented.

Mr. Pullenayagam for the appellant contended that the Magistrate should have accepted the opinion of the Preventive Officer, once he had satisfied himself that he was competent to testify as an expert, unless his opinion had been demonstrated to be unreliable. In this case he submits that the Magistrate had regarded the witness as an expert, and not a question was put to him either in cross-examination or by the Magistrate in regard to the opinion he had expressed ; in this state of the evidence he argued that the Magistrate should have accepted the opinion of the witness though he had not given any reasons for his view.

Two questions arise in my opinion for determination. Is the witness an expert ? In other words, has he a specialised knowledge on the matter he was called upon to testify by reason of special study and experience ? The Magistrate has not expressed a direct opinion in regard to this, but it is implicit in his judgment that he regarded him as an expert. If I was hearing this case I would have probed further into the competency of the witness as an expert before I regarded his evidence as that of a person specially skilled on the subject. I think it is not sufficient to say : " I have been in Service for the last seven years. I had undergone special training to identify excisable articles ". The witness should have been questioned in regard to his experience, the special skill which he claimed to have acquired, the number of instances where he had given his opinion as an expert in Court or elsewhere, the number of cases and the period during which he had testified in Court, and whether there were any cases where his opinion had not been accepted. The burden lay on the prosecutor to elicit relevant material on this matter in order to satisfy the Court that he is what the prosecutor represents him to be ; this, however, does not exclude the duty cast on the Court to satisfy itself that the witness is specially skilled on the subject on which he is called to testify. Though this particular matter was not argued at the hearing of this appeal, I am of the view that the Magistrate should have satisfied himself on this aspect of the matter before he embarked on a consideration of the question whether the evidence of the witness on the identity of the excisable article should be accepted or rejected. The evidence that has been recorded on this question is not sufficient to hold that the witness is an expert.

In regard to the issue on which Counsel for the Crown made his submission, I am unable to accept his argument that the opinion of an expert should be accepted, though he has not given the reasons therefor, unless the Court is of the view that his evidence cannot be relied upon. In this case the witness stated, " I examined the contents of the bottle . . . I am of opinion that it contained Government arrack ". I certainly think this will not suffice ; the Court must be satisfied that the contents were Government arrack and ought not to act on the nude opinion of an expert ; his evidence should be tested by questions as to the opinion he had expressed ; here again the burden is on the prosecutor to elicit the facts on which the witness has based his opinion ; if he had not done so, it is the right and the duty of the Magistrate to question him, because it is he who has to be satisfied. Mr. Pullenayagam submits, " Well, all that a witness if questioned further would say is that he identified the contents to be Government arrack by its smell, taste and colour, and no one would be any the wiser by questioning him any further in regard to these matters ". It is not for me to anticipate what questions may be put to the witness in cross-examination or by the Court on these matters, and I would not be so bold as to say that no useful purpose would be served by questioning the witness on these matters. Crown Counsel's submission is tantamount to saying that the bare opinion of an expert should be accepted without question ; if this view be right, and I certainly do not accept it, the Court would be surrendering its fundamental duty of satisfying itself on a matter of which the burden of proof lies on the prosecutor.

On the evidence that is before me, my judgment is that the appeal should be dismissed. I have given thought to the question whether I should send the case back for a fresh trial, but on reflection I have decided against taking that course.

Appeal dismissed.

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Present : **Abeyesundere, J., and Alles, J.**

WIJESINGHE *vs.* MENIKA & OTHERS*

S.C. 522/1963—*D.C.* (*F*), *Kandy, No. L*/5704.

Argued and decided on : April 2, 1965.

Civil Procedure—Default of appearance of plaintiff on date of trial—Proctor stating to Court that he had made application for revocation of his proxy—No mention of his not appearing for plaintiff or that he had no instructions—Judge entering " decree nisi "—Is such decree valid ?

Held : That no *decree nisi* could be entered against an absent plaintiff on the ground that he was unrepresented merely because his proctor, whose proxy was still on record, stated to Court on the trial date that he had applied for a revocation of the proxy granted to him, without informing the Court that he was not appearing for his client or that he had no instructions from him.

N. E. Weerasooriya, Jnr., for the 10th defendant-appellant.

J. W. Subasinghe, for the plaintiff-respondent.

ABEYESUNDERE, J.

In this case the plaintiff was absent on the date of trial, namely, 12th September, 1963, but his Proctor, Mr. Mustapha, was present and stated to Court that he had filed an application on 9th September, 1963, for the revocation of the proxy granted to him by the plaintiff. Mr. Mustapha did not state that he was not appearing for the plaintiff or that he had no instructions from the plaintiff. The learned District Judge held that the plaintiff was absent and that he was not represented and on that basis entered *decree nisi* against the plaintiff Later, before the expiry of 14 days from the date of the *decree nisi*, an application was made on behalf of the plaintiff for the vacation of the *decree nisi* and the learned District Judge made order declining to vacate the *decree nisi* The plaintiff has appealed from that order.

I am of the view that on 12th September, 1963, the plaintiff was represented by his Proctor, Mr. Mustapha, whose proxy was still on the record on that date and who had not informed Court that he was not appearing for the plaintiff or that he had no instructions from the plaintiff. No *decree nisi*, therefore, could have been entered against the plaintiff. I set aside the decree entered in this case and direct the District Court of Kandy to try this action anew.

I make no order as to costs of appeal as the respondent to this appeal is not present and there was no contest.

ALLES, J.

I agree.

Set aside.

Present : **Sri Skanda Rajah, J.**

GOMES, S.I. POLICE *vs.* BERNARD PERERA

S.C. No. 518/65—*Colombo J.M.C. No.* 3114.

Argued and decided on : 9th July, 1965.

Penal Code, sections 366, 396—Charges of theft and assisting in the disposal of the stolen article—Can a person be convicted of both ?

Held : That a person cannot be convicted of both theft and the disposal of that stolen article.

Accused-appellant in person.

Aloy N. Ratnayake, Crown Counsel, for the Attorney-General.

SRI SKANDA RAJAH, J.

The accused was charged with theft of a Raleigh bicycle and also with assisting in the disposal of that stolen bicycle. He has been convicted on both counts. A person cannot be convicted of both theft and the disposal of that stolen article.

Therefore, I set aside the conviction on count 3 but affirm the conviction and sentence on count 1. The order for Police supervision will stand.

Subject to this variation, the appeal is dismissed.

Appeal dismissed.

* For Sinhala translation, see Sinhala section, Vol. 10 part 4, p. 16.

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ELECTION PETITION, No. 37 *OF* 1965.

ATTANAGALLA—ELECTORAL DISTRICT, NO. 11.

Present : **Sirimane, J.**

G. A. SEKERA PERERA *vs.* SIRIMAVO DIAS BANDARANAIKE

Argued on : 22nd and 23rd September, 1965.
Decided on : 30th September, 1965.

Election Petition challenging the return of a candidate—Charges under section 77 (*a*) *of Ceylon* (*Parliamentary Elections*) *Order-in-Council,* (*Cap.* 381)—*Allegations of undue influence, corrupt practice, misconduct and other circumstances* (*particulars of which to be furnished with particulars of other charges*) *preventing majority of electors from electing candidate whom they preferred—Do the words " misconduct and other circumstances " in section* 77 (*a*) *constitute one charge or two separate charges—Adequacy of security—Rule* 12 (2) *in Third Schedule.*

In a petition challenging the return of a candidate for the Attanagalla Electorate, the petitioners, after alleging charges of undue influence and corrupt practice proceeded to state " that by reason of misconduct " on the part of the respondent, her agents, her supporters and others interested in promoting her candidature, and " by reason of other circumstances " (particulars of which were to be furnished later), the majority of electors were prevented from electing the candidate whom they preferred.

The respondent moved for a dismissal of the petition on the ground that the security of Rs. 5,000/- deposited was inadequate as the petition contained more than three charges and Rule 12 (2) of the Order-in-Council had not been complied with.

Held : (1) That everyone of the grounds set out in section 77 (*a*) constitute a separate and distinct charge.

(2) That those matters which do not come under " misconduct " but still affect the result of the election would be " other circumstances ", *e.g.*, a flood, a cyclone, the collapse of a bridge, any factor which prevents voters from proceeding with reasonable safety to a polling booth. Such circumstances would constitute a distinct charge.

(3) That the petition contained more than three charges and as the petitioners had failed to deposit security as provided for in Rule 12 (2) in the Third Schedule to the Order-in-Council, 1946, the petition must be dismissed.

Per SIRIMANE, J.—" A charge in an election petition, in my view, is a *complaint, i.e.*, something the petitioner has reason to complain of, which prevented the majority of electors from electing the candidate whom they preferred. A charge in this sense may include ' an act of God ', like a flood. "

Cases referred to : *Tillakawardena* v. *Obeysekera*, (1931) 33 N.L.R. 65 ; I C.L.W. 12
Illangaratne v. *G. E. de Silva*, 49 N.L.R. 169 ; XXXVI C.L.W. 97
Jeelin Silva v. *Kularatne*, (1942) 44 N.L.R. 21; XXIV C.L.W. 1
Piyasena v. *Ratwatte*, (1965) LXVIII C.L.W. 41.
Silva v. *Karaliyadde*, (1931) 33 N.L.R. 85; I C.L.W. 19

A. H. C. de Silva, Q.C., with *Izzadeen Mohamed* and *A. C. M. Uvais* for the petitioner.

George E. Chitty, Q.C., with *Colvin R. De Silva, Felix R. Dias Bandaranaike* and *Hanan Ismail*, for the respondent.

J. G. T. Weeraratne, Senior Crown Counsel, with *H. L. de Silva, C.C.*, as *amicus curiae.*

SIRIMANE, J.

The respondent moves that this petition challenging her election to the Attanagalla Electorate be dismissed on the ground that the petitioners have failed to furnish security as required by Rule 12, sub-section 2 of the Ceylon (Parlialmentary Elections) Order-in-Council, chapter 381. That Rule is as follows :—

" The security shall be to an amount of not less than Rs. 5,000/-. If the number of charges in any petition shall exceed three, additional security to an amount of

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Rs. 2,000/- shall be given in respect of each charge in excess of the first three. The security required by this Rule shall be given by a deposit of money."

The petitioners have given security in a sum of Rs. 5,000/-.

It is contended for the respondent that there are, at least, four charges in the petition.

Paragraph 3 of the petition alleges that the respondent has been guilty of undue influence.

Paragraph 4 alleges that she has been guilty of a corrupt practice.

Paragraph 5, which is the relevant paragraph, reads as follows :—

" And your petitioners further state that by reason of misconduct on the part of the respondent, her agents, her supporters and others interested in promoting her candidature, and by reason of other circumstances (particulars of same to be furnished with the particulars of the aforementioned charges) the majority of electors were or may have been prevented from electing the candidate whom they preferred within the meaning of section 77 (*a*) of the said Order-in-Council."

The question is whether paragraph 5 contains more than one charge.

The election of a candidate as a Member can be declared void under any of the grounds set out in section 77 of Chapter 381. The relevant section for the purposes of this inquiry is section 77 (*a*) which is in the following terms :—

" 77 (*a*) That by reason of general bribery, general treating or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of voters were or may have been prevented from electing the candidate whom they referred."

In my view every one of the grounds set out in section 77 (*a*) constitute a separate and distinct charge and the petitioners in paragraph 5 allege : (*a*) misconduct ; (*b*) " other circumstances (particulars of same to be furnished with the particulars of the aforementioned charges "), to reproduce the words in the petition itself. " Misconduct " would mean some act on the part of the respondent (other than those specified earlier in the petition) which affects the result of the election.

Those matters which do not come under " misconduct " but still affect the result of the election would be " other circumstances ", *e.g.*, a flood, a cyclone, the collapse of a bridge—any factor which prevents voters from proceeding with reasonable safety to a polling booth.

I am unable to agree with the contention of learned Counsel for the petitioners that a charge is something which can be alleged against a person and must be a corrupt practice or an illegal practice.

A charge in an election petition, in my view, is a *complaint*, *i.e.*, something the petitioner has reason to complain of, which prevented the majority of electors from electing the candidate whom they preferred. A charge in this sense may include " an act of God ", like a flood.

Reliance was also placed by the petitioners on the dictum of Drieberg, J., in *Tillakawardena* v. *Obeysekera*, 33 N.L.R. 65, where he stated : : " In my opinion by the word ' charges ' in Rule 12 (2) is meant the various forms of misconduct coming under the description of corrupt and illegal practices ". Drieberg, J., was there dealing with charges of corrupt and illegal practices and, I think, it is fairly clear that the definition is not exhaustive. In several cases the word " charge " has been applied to any allegation made against the validity of an election. (*See*, for example, *Illangaratne* v. *G. E. de Silva*, 49 N.L.R. 169, at 183, where the word " charge " was used with reference to " unprecedented floods " which, it was alleged, had affected the election).

My attention was also drawn to a decision of Hearne, J., in *Jeelin Silva* v. *Kularatne*, 44 N.L.R. 21, which was later followed by Sri Skanda Rajah, J., in *Piyasena* v. *Ratwatte*, 68 C.L.W. 41.

In *Jeelin Silva* v. *Kularatne* (*supra*) the petition contained charges of undue influence, treating and impersonation. It was also prayed that the election be declared void by reason of general intimidation and impersonation on a large scale and of general treating. The question to be decided was whether there were more than three charges. Hearne, J., expressed himself thus : " The only question is how many charges did the petition contain ? the answer, as a matter of simple calculation, is four. There were three of

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corrupt practices alleged to have been committed by the respondent or his agents and one of general intimidation, general treating, etc., which if proved would have had the effect of unseating the successful candidate . . .". I am inclined to agree with the submission of learned Counsel for the respondent, that once it was established in that case that there were more than three charges, the learned Judge did not find it necessary to carefully examine the question whether the prayer which contained the fourth charge, also contained within it more charges than one. If the decisions cited above are relied on as authority for the proposition that any or all the grounds set out in section 77 (*a*) which result in the majority of voters being prevented from electing the candidate of their choice form only a *single charge* because the result is the same, I regret I am unable to share that view, and with great respect must record my dissent therefrom.

The purpose in taking security is to defray, as far as possible the costs that may be incurred by a successful respondent in defending himself against various charges. The evidence needed to meet a charge of general intimidation would be different from that needed to meet a charge of general bribery ; and the evidence required to meet one of "other circumstances" would be different from both.

Merely because the ensuing result must be shown to be the same, (*viz*., that the majority of the electors were prevented from electing the candidate they preferred) it would be unreal, in my view, to regard all the charges as set out above as one single charge.

In *Silva* v. *Karaliyadde*, 33 N.L.R. 85, where a question very similar to the one in the present case came up before Drieberg, J., the learned Judge said : "In my opinion the charges of general bribery, general treating and general intimidation were distinct charges from those of bribery, treating and undue influence in regard to ascertained and named persons . . .". I am in respectful agreement with that view. In my opinion the petition contains four complaints, grounds or charges on which it is sought to challenge the election. They are :—

(1) Undue influence ;
(2) Corrupt practice ;
(3) Misconduct ; and
(4) Other circumstances.

As only a sum of Rs. 5,000/- has been deposited, the petitioners have failed to give security as provided by Rule 12, and acting under subsection 3 of that Rule I dismiss the petition with costs.

I am grateful to learned Counsel who appeared for the parties and to Crown Counsel who appeared as *amicus curiae* for the assistance rendered at the argument.

Application allowed.
Election petition dismissed.

ELECTION PETITION, No. 6 OF 1965.

ELECTORAL DISTRICT, NO. 17—KOLONNAWA.

Present : **T. S. Fernando, J.**

LIYANAGE SOMADASA PERERA *vs.* DON SENADHEERA SAMARASINGHE

Argued on : 30th September and 1st October, 1965.
Order delivered on : 12th October, 1965.

Election Petition—Charges of bribery, undue influence and a further allegation that by reason of "misconduct on the part of the respondent, his agents, supporters and political connexions and by reason of other circumstances" majority of voters prevented from electing the candidate they preferred—Does this further allegation contain one charge or more than one?—Adequacy of security—Ceylon (Parliamentary Elections) Order-in-Council, 1946, *section* 77 (*a*) *—Rule* 12 *of Election Petition Rules in Third Schedule.*

In addition to charges of bribery and undue influence an election petition contained the following paragraph :

> "Your petitioner further states that by reason of misconduct on the part of the respondent, his agents, supporters and political connexions and by reason of other circumstances, the majority of electors were or may have been prevented from electing the candidate whom they preferred."

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The respondent moved for the dismissal of the petition under Rule 12 (3) of the Parliamentary Election Rules on the ground that sufficient security had not been given by the petitioner as required by Rule 12 (2).

It was contended for the respondent that the allegations set out in the above paragraph contained, at least, two charges and, therefore, the security deposited in a sum of Rs. 5000/- was inadequate. The contention on behalf of the petitioner was that it contained only one charge.

After reviewing the previous relevant decisions of the Supreme Court, His Lordship --

Held : That the "other circumstances" referred to in the paragraph aforesaid formed a group of facts different from "misconduct" and, therefore, the petition contained more than three charges. The Security given being only Rs. 5 000/-, the petitioner had failed to comply with Rule 12 and consequently the petition must be dismissed.

Per T. S. FERNANDO, J.—(*A*) "It follows that a ground does not mean the same thing as a charge and that a single ground may sometimes involve several charges."

(*B*) "........ I apprehend section 77 (*a*) as not being confined to misconduct on the part of the elected candidate and his agents. I think clause (*a*) has a wider import and embraces the acts of persons quite independent of the elected candidate. General bribery, general treating and general intimidation could avoid an election even where it has not been proved or even attempted to be proved that the elected candidate or his agents participated in those acts."

(*C*) "I feel compelled to observe that much of the difficulty experienced in this class of case can well be avoided if, at the time of drawing up an election petition, the draftsman gives his mind to the real nature of the allegations relied on by the petitioner."

Cases referred to : *Tillekewardene* v. *Obeyesekere*, (1931) 33 N.L.R. 65; I C.L.W. 12
Perera v. *Jayewardene*, (1947) 49 N.L.R. 1; XXXV C.L.W. 105.
Harris v. *Director of Public Prosecutions*, (1952) A.C. 699 ; (1952) 1 A.E.R 1099; (1952) 1 T.L.R. 1025.
Jeelin Silva v. *Kularatne*, (1942) 44 N.L.R. 21; XXIV C.L.W.I.
Mohamed Mihular v. *Nalliah*, (1944) 45 N.L.R. 251; XXVII C.L.W. 63.
Silva v. *Karaliadde*, (1931) 33 N.L.R. 85; I C.L.W. 19.
Piyasena v. *Ratwatte*, (1965) LXVIII C.L.W. 41.
Perera v. *Bandaranaike*, (1965) LXVIII C.L.W. 79.
Perera v. *Perera*, (1965) LXVII C.L.W. 73.

Izadeen Mohamed, with *A. C. M. Uvais* and *H. D. Tambiah*, for the petitioner.

Colvin R. de Silva with, *Felix R. Dias Bandaranaike*, *Hanan Ismail*, (*Mrs.*) *F. R. Dias Bandaranaike* and (*Miss*) *Manouri de Silva*, for the respondent.

T. S. FERNANDO, J.

There are two election petitions filed in respect of the election of the respondent as a Member of the House of Representatives for electoral district, No. 17, Kolonnawa. These two petitions are numbered 6 of 1965 and 27 of 1965, respectively.

The matter which necessitates this present order arises upon a motion of the respondent that petition No. 6 of 1965 presented by the petitioner be dismissed in terms of rule 12 (3) of the Parliamentary Election Petition Rules, 1946, contained in the Third Schedule of the Ceylon (Parliamentary Elections) Order-in-Council, 1946. The motion is founded upon the allegation that security as provided in rule 12 has not been given by the petitioner.

Rule 12 (2) requires that the security to be given by a petitioner shall be to an amount of not less than Rs. 5,000/-. The rule further requires the petitioner, if the number of charges in a petition shall exceed three, to give additional security to an amount of Rs. 2,000/- in respect of each charge in excess of the first three. The amount of security given was Rs. 5,000/-. The respondent contends that there are more charges than three in the petition in question.

An examination of the petition shows that each of the paragraphs 3 and 4 thereof contains a charge against the respondent, paragraph 3 alleging that the corrupt practice of bribery (section 57) was committed while the other paragraph alleges the commission of the corrupt practice of undue influence (section 56 of the Order-in-Council). In view of the decisions in *Tillekewardene* v. *Obeyesekere*, (1931) 33 N.L.R. 65, and *Perera* v. *Jayewardene*, (1947) 49 N.L.R. 1, there is no dispute that whatever be the number of acts or instances, for example, of bribery sought to

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be proved against a respondent, the charge laid against him in a petition is a single one of bribery. If then paragraphs 3 and 4 of petition No. 6 contain only two charges, the only question that remains is whether paragraph 5 alleges more than one charge within the meaning of that expression occurring in the rule in the Third Schedule.

Paragraph 5 is reproduced below in full :—

> " Your petitioner further states that by reason of misconduct on the part of the respondent his agents supporters and political connexions and by reason of other circumstances the majority of electors were or may have been prevented from electing the candidate whom they preferred."

The petition contends that this paragraph, if it contains any charge at all, contains only one charge while the respondent argues that it contains at least two charges.

I shall now turn to the sections in the Order-in-Council which enumerate the grounds for avoiding elections. Section 76 has enacted that the election of a candidate as a Member is avoided by his conviction for any corrupt or illegal practice, while section 77 specifies the grounds on proof of which the election of a candidate is required to be declared void. The ground relevant to the present petition is specified in the Order-in-Council in the language quoted below :—

> (*a*) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred.

It was first contended on behalf of the petitioner that paragraph 5 contains no charge at all within the meaning of rule 12 (2). Reliance was placed on the definition of a charge as set out by Drieberg, J., in *Tillekewardene* v. *Obeysekere* (*supra*) which was approved by the Divisional Bench in *Perera* v. *Jayewardene* (*supra*). In the first-mentioned of these cases, Drieberg, J., stated " in my opinion by the word ' charge ' in rule 12 (2) is meant the various forms of misconduct coming under the description of corrupt and illegal practices ; for example, whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery ". I do not think it can be said that this definition—if it was intended to be such—is exhaustive. As Viscount Simon stated in *Harris* v. *Director of Public Prosecutions*, (1952) A.C., at 711, " it must be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the Court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances ". The Court was not concerned in either of the two cases, *Tillekewardene* v. *Obeyesekere* and *Perera* v. *Jayewardene*, with allegations of general bribery, general treating, general intimidation, or other misconduct which are strictly not corrupt or illegal practices as defined in section 54 to 71 of the Order-in-Council. The allegations in the petitions in both these cases were confined to what may strictly be called corrupt or illegal practices. Our Courts have held that allegations of general intimidation and general treating go to form a " charge " as contemplated in the rule in question—*vide Jeelin Silva* v. *Kularatne*, (1942) 44 N.L.R. 21. It is implicit also in the decision in *Mohamed Mihular* v. *Nalliah*, (1944) 45 N.L.R. 251, that grounds (*a*) and (*b*) in the petition on which that case commenced which did not by any means allege the commission of any corrupt or illegal practice constituted charges within the meaning of rule 12 (2). At one stage of the argument, learned counsel for the petitioner contended that every ground for avoiding an election is not a charge within the meaning of rule 12, and that it is only a ground that involves the respondent (the elected candidate) in some form of misconduct for which he is answerable that constitutes a charge. This proposition means that, allegations against persons like returning officers and others, allegations of general bribery, etc., and an allegation that the person elected was disqualified for election do not constitute charges at all. I am unable to agree that the argument is sound ; it is, indeed, contrary to the practice that has hitherto obtained, and, if it is correct, it follows that where a petitioner alleges against an elected candidate three charges of corrupt or illegal practices and one or more charges against a returning officer or other officer, the amount that is required to be given as security is Rs. 5,000/-. Such a situation leaves the respondent or respondents other than the elected candidate without security for his costs at all.

The next line of argument on behalf of the petitioner was that clause (*a*) of section 77 merely gives statutory recognition to the principle of the English Common Law that an election must be real and free, and that the ground or reasons specified in clause (*a*) constitute but one charge within the meaning of rule 12 (2). Reference was made to certain election petition cases decided in

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England and elsewhere, but, with all respect, I am unable to derive any assistance on the point in issue on this motion from cases decided in other jurisdictions where the amount of security for costs is not dependent on the number of charges laid in an election petition. It was also contended that each of the clauses (*a*) to (*e*) contains but one charge, but this contention, I fear, failed to take account of the fact that it is now settled that under clause (*c*) which must be taken as reading "that a corrupt practice or practices or an illegal practice or practices was or were committed" several charges (within the meaning of rule 12) could be laid in a petition. It follows that a ground does not mean the same thing as a charge and that a single ground may sometimes involve several charges.

There are certain dicta and decisions of election judges which bear on the point that directly arises here and which, therefore, require examination. In their chronological order, the first of these is an observation of Drieberg, J., in *Silva* v. *Karaliadde,* (1931) 33 N.L.R. 85, contained in the following passage from his judgment :—

> "The petition makes charges of treating, bribery, undue influence, and conveyance of voters ; in paragraph 3 (*d*) the petition alleges 'that by reason of general bribery, treating, intimidation, and other circumstances the majority of voters were prevented from voting for the candidate whom they preferred'. It was, no doubt, intended to allege the offence set out in Article 74 (A). In my opinion the charges of general bribery, general treating, and general intimidation were distinct charges from those of bribery, treating and undue influence in regard to ascertained and named persons dealt with in Articles 51, 52, and 53 (of the Ceylon—State Council Elections—Order in Council, 1931), respectively."

In the above observation the dictum that is relevant for the purposes of the motion before me is no doubt, *obiter*, but it is permissible to say that if treating, bribery and undue influence do constitute three separate charges, there is little reason why general bribery, general treating, and general intimidation should not similarly constitute three separate charges. Eleven years later, Hearne, J., in *Jeelin Silva* v. *Kularatne* (*supra*) stated "The only question is how many charges did the petition contain ? The answer, as a matter of simple calculation, is four. There were three of corrupt practices alleged to have been committed by the respondent or his agents and one of general intimidation, general treating, etc., which, if proved, would have had the effect of unseating the successful candidate, even if connivance on his part or agency could not be established. It must, therefore, be held that the security tendered by the petitioner was insufficient". I can hardly resist the inference that the main issue on which counsel and judge concentrated during the argument was whether the security of Rs. 5,000/- deposited was sufficient. It would have been insufficient if the charges were in excess of three. It was immaterial whether the charges were four, five, or six.

Both these cases (*Silva* v. *Karaliadde* and *Jeelin Silva* v. *Kularatne*) came to be examined by Sri Skanda Rajah, J., recently in *Piyasena* v. *Ratwatte*, (1965) 68 C.L.W. 41, and that learned judge while recognising that the dicta in both cases were made *obiter*, preferred to act as if the dictum of Hearne, J., represented the correct position in law. In the petition before Sri Skanda Rajah, J., there were three charges alleging the commission, with the knowledge or consent of the elected candidate, of the corrupt practice of making false statements in relation to the personal character of a candidate (section 58), of treating (section 55) and of undue influence (section 56). In addition, there was a further ground or allegation that "such misconduct and/or other circumstances prevailed at the said election within the meaning of section 77 (*a*) that the majority of electors were or may have been prevented from electing the candidate whom they preferred". This ground or allegation was held by the learned judge to constitute only one charge.

Next in point of time is the very recent decision of Sirimane, J., in which he, on 30th September, 1965, dismissed Election Petition No. 37 of 1965,* holding that the allegation reproduced below constituted the laying of more than one charge :—

> "By reason of misconduct on the part of the respondent, her agents and supporters and others interested in promoting her candidature, and by reason of other circumstances (particulars of same to be furnished with the particulars of the aforementioned charges) the majority of electors were or may have been prevented from electing the candidate whom they preferred."

Finally, there is the decision of Abeyesundere, J., given on the next day, the 1st October, 1965, when he came to dismiss Election Petition No. 1 of 1965.† That petition contained in paragraphs 3 and 4 what constituted respectively a charge of

* See 68 C. L. W. 73

† See 68 C. L. W. 80

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committing a corrupt practice (section 58) and a charge of committing an illegal practice (section 68A). I understand the decision to mean that the allegation in paragraph 5 that " by reason of general intimidation and/or other misconduct and/or other circumstances, the voters were prevented from freely exercising their franchise and electing the candidate of their choice " contained two charges.

The petition (No. 6 of 1965) that is before me bears a close resemblance to that dismissed by Sirimane, J. Both petitions contained allegations constituting two charges of commission of corrupt practices. They also contain additional allegations that by reason of misconduct and by reason of other circumstances the majority of electors were prevented from electing the candidate whom they preferred. In regard to the number of charges contained in the additional allegations I have reached the same view as that which commended itself to Sirimane, J., I respectfully agree with his view that when the rule in question refers to a charge it contemplates something in the nature of complaint. Counsel for the respondent suggested that anything that can avoid an election can be the subject of complaint in a petition. The complaint need not necessarily be one against the elected candidate. It could take in other circumstances, *e.g.*, acts of God, on proof of which, with proof also that the majority of voters were or may have been prevented thereby from electing the candidate of their choice, the election is avoided. I might add that I observe that in the course of his judgment, Sirimane, J., states that " misconduct " in section 77 (*a*) would mean some act on the part of the respondent which affects the result of the election. Here again, the judicial observation must be understood as having been made with reference to the particular facts before the Court. The petition in the particular case complained of misconduct on the part of the respondent, but I apprehend section 77 (*a*) as not being confined to misconduct on the part of the elected candidate and his agents. I think clause (*a*) has a wider import and embraces the acts of persons quite independent of the elected candidate. General bribery, general treating and general intimidation could avoid an election even where it has not been proved or even attempted to be proved that the elected candidate or his agents participated in those acts.

As a final argument the petitioner's counsel urged that, in any event, paragraph 5 contains no more than one charge. I do not find it possible to accede to this argument. If, as in my view it must be conceded, " other circumstances " embrace *inter alia*, acts of God, a species of acts which can by no means be said to be misconduct, then " other circumstances " form a group of acts different from misconduct. General bribery, general treating and general intimidation appear to be regarded as forms of misconduct, but as clause (*a*) of section 77 itself expressly recognises that " other circumstances " need not be similar to the forms of misconduct specified in the section, it seems to follow that where other circumstances are relied on in the petition a specific charge is to that extent therein laid. I feel compelled to observe that much of the difficulty experienced in this class of case can well be avoided if, at the time of drawing up an election petition, the draftsman gives his mind to the real nature of the allegations relied on by the petitioner. As security must be given at the time of the presentation of the petition, or within three days afterwards, the petitioner must in any event advise himself as to the correct number of charges he has laid. This is best done at the time the petition itself is being drafted, and if that counsel be heeded, later heart-burning may be avoided.

I hold that the petition contains more than three charges. Security given being only Rs. 5,000/-, it follows that security as provided in rule 12 has not been given by the petitioner. I have, therefore, to grant the motion of the respondent and to order the dismissal of the petition. I accordingly do so, and direct that the petitioner do pay the costs of the respondent which I fix, with consent of parties, at Rs. 1050/-.

Application allowed.
Election petition dismissed.

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ELECTION PETITION, No. 1 *OF* 1965.

BANDARAGAMA—ELECTORAL DISTRICT, NO. 27.

Present : **Abeyesundere, J.**

DON EDIN WIJESEKERE & ANOTHER *vs.* K. DON DAVID PERERA.

Argued and decided on : 1st October, 1965.

Ceylon (Parliamentary Elections) Order-in-Council, 1946, *section* 77 *and Rule* 12 (2) *in Third Schedule—Petition challenging the election of respondent—Two charges set out in paragraphs* 3 *and* 4 *respectively, of petition—Reference to " other misconduct " in paragraph* 5 *of the petition—Adequacy of Rs.* 5,000/- *deposited as security—Meaning of the terms " charges " in Rule* 12 (2) *and " other misconduct " in section* 77.

Held : (1) That the expression "charges" in rule 12 (2) means only those of the grounds set out in section 77 which fall within the category of the corrupt or illegal practices specified or included in that section.

(2) That the expression "other misconduct" occurring in paragraph 5 of the petition includes 2 charges *i.e.* of corrupt practice and illegal practice. It was not intended to indicate only one other form of misconduct, but included all other forms not earlier specified.

(3) That, therefore, there being four charges, the amount of security deposited, viz., Rs. 5,000/- was inadequate, and the petition must be dismissed.

Followed: *Tillakawardene* v. *Obeysekere,* (1931) 33 N.L.R. 65; I C.L.W. 12.
Perera v. *Jayawardena,* (1947) 49 N.L.R. 1; XXXV C.L.W. 105.

A. C. Gooneratne, Q.C., with *H. D. Tambiah, Ranjan Gooneratne,* and *U. H. Rodrigo,* for the petitioner.

Dr. Colvin R. de Silva with *K. Shinya, Hanan Ismail* and *Miss Manouri de Silva,* for the respondent.

ABEYESUNDERE, J.

Don Edin Wijesekere and Ponsuge Bartholis Thisera, hereinafter referred to as the petitioners, have presented to the Supreme Court an election petition, hereinafter referred to as the election petition, No. 1, against the election of Kongahakankanamge Don David Perera as Member of Parliament for the Electoral District of Bandaragama at the General Election held on the 22nd of March, 1965, hereinafter referred as the respondent.

It is alleged by the respondent that the number of charges within the meaning of rule 12 (2) of the Parliamentary Election Petition Rules, 1946, disclosed in the election petition, No. 1, is more than three and that, therefore, the sum of Rs. 5,000/- deposited by the petitioners as security is inadequate under the said rule 12 (2). Consequently the respondent has applied under rule 12 (3) of the said Rules for the dismissal of the election petition No. 1.

The said rule 12 (2) provides that the security shall be to an amount of not less than Rs. 5,000/- and that if the number of charges in the election petition exceeds three, additional security to an amount of Rs. 2,000/- shall be given in respect of each charge in excess of the first three. In order to determine the number of charges disclosed in the election petition No. 1 it is necessary to ascertain the meaning of the expression " charges " occurring in the said rule 12 (2). The expression " charges " occurred in a rule of 1931 which is similar to the said rule 12 (2), and that rule of 1931 was considered by the Supreme Court in the case of *Tillakewardane* v. *Obeyesekera* reported in 33 New Law Reports, page 65, and the expression " charges " occurring in that rule was interpreted to mean " the various forms of misconduct coming under the description of corrupt and illegal practices ". The said rule 12 (2) is identical in its terms with the aforesaid rule of 1931. A bench of three judges of the Supreme Court considered the said rule 12 (2) in the case of *Perera* v. *Jayewardene* reported in 49 New Law Reports, page 1, and in interpreting the expression " charges " occurring in that rule approved the interpretation given to that expression by the

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Supreme Court in the aforesaid case of *Tillakewardane* v. *Obeyesekera.*

I do not agree with the view that all the grounds specified in section 77 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, are charges within the meaning of the said rule 12 (2). In the set of rules in which the said rule 12 (2) occurs the expression " grounds " occurs in one place and the expression " charges " occurs in another. In rule 4 (1) (*b*) the expression " grounds " is used and in rule 12 (2) the expression " charges " is used. Two different expressions were thus used in order to convey two different meanings. It appears to me that the reason for using the expression " charges " in the said rule 12 (2) instead of the expression " grounds " occurring in the said section 77 is that the legislature intended to limit the matters for which additional security should be provided and thereby to limit the amount of the additional security. The charges within the meaning of the said rule 12 (2) are only those of the grounds set out in the said section 77 which fall within the category of the corrupt or illegal practices specified or included in that section.

It was contended on behalf of the respondent that the expression " other misconduct " occurring in paragraph 5 of the election petition, No. 1, includes two charges, namely, the charge of corrupt practice and the charge of illegal practice. The corrupt practice that is specified or included in the said section 77 is a misconduct and so is the illegal practice specified or included in that section. The expression " other misconduct ", therefore, undoubtedly includes both such corrupt practice and such illegal practice as aforesaid. It was argued on behalf of the petitioners that the expression " other misconduct " occurring in the said paragraph 5 was intended to indicate only one other form of misconduct. In my view, the expression " other misconduct " occurring in that paragraph is intended to include all other forms of misconduct not already specified in the election petition, No. 1.

As the expression " other misconduct " occurring in the said paragraph 5 includes two charges, one of corrupt practice and the other of illegal practice, there are at least two charges disclosed in that paragraph. When those charges are added to the charge disclosed in paragraph 3 and the charge disclosed in paragraph 4 of the election petition No. 1, that petition discloses at least four charges. I therefore hold that the sum of Rs. 5,000/- deposited by the petitioners is inadequate security under rule 12 of the Parliamentary Election Petitions Rules, 1946. Consequently the application for the dismissal of the election petition No. 1 made by the respondent must succeed. I dismiss the election petition No. 1 with costs. The petitioners shall pay the respondent as costs of the inquiry into the application made by the respondent the sum of Rs. 787/- which is agreed upon by the counsel for the petitioners and the counsel for the respondent.

Application allowed.
Election petition dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : **Sansoni, C.J. (President), H. N. G. Fernando, S.P.J., and G. P. A. Silva, J.**

THE QUEEN *vs.* G. K. JAYASINGHE & OTHERS

Appeal Nos. 31 *to* 37 *of* 1965 *with Application Nos.* 36 *to* 42 *of* 1965.
S.C. No. 124 *of* 1964—*M.C. Kalawana, No.* 88577.

Argued on : September 20 and 21, 1965.
Decided on : October 4, 1965.

Court of Criminal Appeal—Charges of conspiracy to commit murder and murder—Several accused—Case for defence not adequately placed before Jury in summing-up—Demeanour of witness dealt with in summing-up—Contradictions not properly dealt with—Misdirection and non-direction regarding corroboration—Case of each accused not considered separately—Value of corroborative evidence—Nature of corroboration required—Accused deprived of substance of fair trial—Duty of trial Judge in expressing opinions—Why re-trial not ordered.

In this case, eight accused were indicted on three counts. The first count was for having conspired to commit the murder of one Silva between 20th July, 1962, and 21st August, 1962. The second and third counts charged them with the

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murder of Silva and one Punchimahatmaya between the 20th and 21st August, 1962. All the accused, except the 8th accused, were convicted on all counts.

The case for the prosecution rested almost entirely on the evidence of a witness, Daniel. It was accepted by the prosecution and the trial judge that on his own evidence Daniel was a self-confessed accomplice.

The following grounds of appeal were urged at the hearing of the appeal :—

(1) that the Jury were misdirected and misled by the learned Commissioner of Assize in his charge, on a vital issue of law, viz. : (*a*) the proper approach to the evidence of an admitted accomplice ; and (*b*) what constitutes corroboration of an accomplice ;

(2) the learned Commissioner should have made it clear to the Jury that there was no independent evidence of corroboration. He had, instead, made them believe that what could not constitute corrobortaion was, in fact, corroboration ;

(3) the summing up, as a whole, did not deal adequately with the evidence and was not fair to the accused ; and the facts were dealt with in such a way as to favour the prosecution theory : and

(4) the case for the defence on the facts was not adequately placed before the Jury.

Held : (1) That the complaints that the summing-up was unfair to the accused and that the case for the defence on the facts was not adequately placed before the Jury were borne out in several respects. These included :—

(*a*) An indication by the Commissioner plainly, on the logic of his reasoning, that there was no cause for the accomplice to kill Silva, whereas the defence had suggested a strong motive for his doing so, and the fact that it was not left to the Jury to decide the matter for themselves ;

(*b*) One assumption followed another, but each theory put forward was treated as proved, and the final conclusion was then stated as though it was the only possible one ;

(*c*) A strong point which the defence had made against the credibility of the accomplice was whittled down and the Jury were clearly told that his untruthfulness on a certain point was pardonable ;

(*d*) The demeanour of the accomplice in the witness-box was dealt with instead of leaving it to the Jury to decide for themselves what impression his demeanour had made on them ;

(*e*) After very apposite comments regarding the accomplice's account of the incidents of the relevant night, which should have made the Jury suspect the truth of his story by reason of the improbabilities therein, he told them that the very improbability of the story was a guarantee of its truth and sought to explain away the defence suggestions on that matter ;

(*f*) The points made by the defence against the evidence of the accomplice in regard to the meeting between some of the accused at which they were alleged to have conspired to commit murder were not fairly dealt with in the summing-up ;

(*g*) Contradictions even on material points which should have shaken the veracity of the accomplice, were either not dealt with or were unfairly treated as points in his favour, and the witness was held up as a witness of truth. The explanations given by the Commissioner and the emphasis laid by him on the side of the truthfulness of that evidence did not appear to leave very much for the judgment of the Jury as to the credibility or otherwise of the accomplice ;

(*h*) On a number of matters, the Commissioner had gone to the defence of the accomplice and had nothing favourable to say about the defence criticisms of his evidence on those matters.

(2) That the manner in which some of the necessary directions on matters of law were conveyed to the Jury, and the omission to direct the Jury on some matters of law also made the summing-up unfair and showed that the mind of the Commissioner was not alive to matters favourable to the defence. Thus :—

(*a*) In the directions concerning the evidence of an accomplice, unusual stress was laid on the point that corroboration of such evidence is not an essential requirement. This was frequently repeated but the gravity of a decision to convict on such uncorroborated evidence was not stressed ;

(*b*) Having thus expressed himself, it was the duty of the Commissioner, to draw special attention to aspects of the accomplice's conduct and evidence which could shake confidence in his credibility ;

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(*c*) Though a proper direction was given at an early stage regarding the approach to the evidence of a witness in a case where it is shown clearly that some part of his evidence is false, the vital question whether, if the accomplice's evidence was false on some material points, it would be safe to convict upon his testimony which was, in fact, very nearly uncorroborated, was not directly posed to the Jury, and the example quoted by the Commissioner for their guidance was one which could only have induced an attitude favourable to the prosecution ;

(*d*) No distinction was drawn between the cases of those accused against whom there was the direct testimony of the accomplice on the count of conspiracy, and the other accused, in whose case, a finding on that count could depend only on an inference from their alleged conduct on the night of the murders.

(3) That even though evidence that four of the accused were seen by another witness in a car at a point about three-fourths of a mile from the scene of the offence, about 1 1/2 hours after the time when they were alleged to have gone in a car and met the accomplice, may be legally admissible for the purpose of corroboration, its probative value as corroboration might be very slight or even nil, and it could not go far to connect or tend to connect those accused with the offences charged or to confirm the accomplice's evidence against them in a material particular.

(4) That it was a grave omission not to tell the Jury that the evidence of the accomplice was not corroborated in any way by any witness as against three of the other accused.

(5) That a clear direction is always necessary that the corroboration that the law requires is corroboration in some material particular tending to show that *each* accused committed the crime charged.

(6) That the evidence of another witness that one of the accused asked him to say that he saw one of the deceased alive on the morning after the murder could be considered corroboration of the evidence of the accomplice because, in the absence of any explanation from that accused, it indicated that he was trying to fabricate evidence to show that the murder took place long after its actual commission.

(7) That looking at the charge, as a whole, it could be concluded that it was of such a character as to deprive the appellants of the substance of a fair trial, inasmuch as :—

(*a*) the Commissioner dealt with the attacks of the defence on the credibility of the accomplice in such a way as virtually to render such attacks harmless and impotent ;

(*b*) the accused thereby ran the grave risk of the accomplice's uncorroborated evidence being acted upon ;

(*c*) the Commissioner expressed his opinions very freely in his charge and there was some ground for the complaint that the defence suggestions were not favourably or fairly dealt with.

(8) That a re-trial should not ordered in this case because a period of over three years had lapsed since the commission of the offence, and because of the unreliable nature of the accomplice's evidence on which alone the prosecution rested.

Per Sansoni, C.J.—" Lord Devlin, in the Privy Council judgment cited, pointed out that a jury is likely to pay great attention to the opinions of a presiding judge, and that is why those opinions should not be much stronger than the facts warrant.

' It is always necessary to bear in mind that the power given to a trial Judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice. Although at the commencement of the summing up the learned Commissioner made some preliminary observations which were extremely appropriate to a case of this nature, and which correctly directed the Jury on their proper function as judges of fact, we cannot escape the feeling that the total effect of his later strong expressions of opinion obliterated the good effect of the preliminary observations.

' Finally, we quote the following words from that judgment as they express our view of the learned Commissioner's summing-up : ' The summing-up, as a whole, cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant(s) (have) thus been deprived of the substance of a fair trial '."

Followed : *Broadhurst* v. *R.*, (1964) A.C. 441 ; (1964) 2 W.L.R. 38 ; (1964)1 A.E.R. 111.

E. F. N. Gratiaen, Q.C., with *Eardley Perera* and *M. A. Mansoor*, for the 1st accused-appellant.

E. F. N. Gratiaen, Q.C., with *M. A. Mansoor* and *Anil Obeyesekera*, for the 2nd accused-appellant.

E. F. N. Gratiaen, Q.C., with *A. C. M. Ameer, Q.C.*, *M. A. Mansoor* and *Anil Obeyesekera*, for the 3rd accused-appellant.

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E. R. S. R. Coomaraswamy with *Kumar Amarasekera*, for the 4th and 5th accused-appellants.

G. E. Chitty, Q.C., with *E. R. S. R. Coomaraswamy* and *Kumar Amarasekera*, for the 6th accused-appellant.

Colvin R. de Silva with *M.L. de Silva*, (*Miss*) *Manouri de Silva*, *P. O. Wimalanaga* and *Kumari Amerasekera*, for the 7th accused-appellant.

L. Jayatilleke (*assigned*), for all the accused-apellants.

V. Thamotheram, Deputy Solicitor-General, with *Siva Pasupathy, Crown Counsel*, and *Ranjit Abeysooriya, Crown Counsel*, for the Crown.

SANSONI, C.J.

In this case eight accused were indicted on three counts. After trial they were all convicted on all the counts, except the 8th accused who was acquitted on all the counts. The seven convicted accused have appealed.

On the first count they were charged with having conspired between 20th July, 1962, and 21st August, 1962, to commit the murder of one Silva. On the second count they were charged with the murder of Silva between the 20th and 21st August, 1962. On the third count they were charged with the murder of one Punchimahatmaya, at the same time and place as the murder of Silva.

The case for the prosecution rested almost entirely on the evidence of a witness named Daniel, who was at the time in question an attendant at Kalawana Hospital, where the 6th accused also worked as the Apothecary. The 1st accused was the Inspector of Police, Kalawana. The 2nd accused was a Police Constable and the 7th accused a Police Sergeant, both under the 1st accused. The 3rd accused was a landed-proprietor who owned land at Kalawana, but who resided mainly at Dehiwela, many miles away. The 4th accused was the Village Committee Chairman of Kalawana. There is no evidence as to the 5th accused's occupation. The 8th accused was a motor mechanic, who also worked at times as a motor car driver under the 3rd and 4th accused.

The murdered man, Silva, was an Ayurvedic Physician, who also appears to have encouraged unlawful gambling in his house ; the murdered man, Punchimahatmaya, was Silva's servant.

Daniel said that, shortly prior to the 1st of August, he went to the 6th accused's house in the evening at the invitation of the 6th accused. The 3rd accused arrived there carrying a live fowl which he himself killed. 1st, 4th and 5th accused also came to that house. Daniel cleaned and cooked the fowl, boiled some vegetables, sliced some bread and then all those accused who were there dined in that house that night. Daniel said that he heard some of the conversation that took place during the meal. The 1st accused said, " If Silva is allowed to remain it will not be possible for us to live. Something must be done to that fellow ". 3rd accused said : " He has given me also a bit of trouble ", and 4th accused said, " That is not much of a job ". Daniel does not claim to have heard the 5th or 6th accused saying anything, except that 6th accused warned Daniel not to tell anyone of what had been said during that conversation.

The next series of incidents spoken to by Daniel are said to have occurred on the night of 20th August. He reported for night duty at about 6 p.m. as a substitute for another attendant called Charles. He said that both Charles and the 6th accused asked him to be on duty that night. When he was at the hospital, the witness named Ekmon asked him to go and meet the 6th accused who was near the Mortuary in the hospital premises. When he went up to the 6th accused, the latter told him to direct any patients who might come to the hospital to the 2nd Apothecary. Daniel said he then returned to the hospital.

At about 12.30 a.m. on the 21st morning, according to Daniel, two motor cars came near the hospital ; and the 6th accused, who was among those who arrived in the cars, took him up to them. In one there were the 1st, 2nd and 7th accused ; that was the 1st accused's car driven by the 1st accused. In the other car, 8th accused was the driver, and the 3rd. 4th and 5th accused got down from it. All the occupants of the cars, except the 8th accused, came up to him, and the 6th accused told him that he had to do a small job, viz., to strike a barrel or a zinc sheet and thus make a noise, when he heard the report of a gun shot. Daniel also said that at that time 2nd accused took a double barrel gun from the 4th accused's car, while the 3rd accused had a

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pistol or revolver which he loaded. 2nd and 3rd accused then walked away, 3rd accused saying, " Now the time is approaching ". When Daniel started to walk back towards the hospital, the 6th accused called him back and ordered him to get into the 1st accused's car which the 6th and 7th accused also entered. 4th, 5th and 8th accused were the occupants of the other car. Both cars travelled in the direction of the deceased's house. 5th accused stopped near the 23rd mile post, while 7th accused was dropped near a house belonging to one Bentara Mudalali. The deceased's house is between these two points. Daniel said that he saw the 2nd and 3rd accused entering the rear compound of the deceased's house. He was then told to go back to the hospital, and carry out the instructions he had been given.

According to Daniel, when he was near a hospital ward he heard a loud sound like the report of a gun shot, and he then threw a stone which hit a barrel. About half an hour later the 1st accused's car arrived with the 1st, 2nd, 3rd and 6th accused in it. The 1st accused took Daniel to the car and warned him not to talk about what had happened.

At the post-mortem examination of the two dead men, the Doctor discovered that Silva had been shot with a revolver, and Punchimahatmaya with another firearm. The post-mortem on Silva was at 2.30 p.m. and on Punchimahatmaya at 4.30 p.m., both examinations having been held on the 22nd August, and the Doctor's opinion was that the two men had died 36—54 hours earlier.

That evening Daniel got to know that Silva and his servant, Punchimahatmaya, had been killed. He did not disclose what he knew to anybody until the 12th September, when he was taken by a Police Constable to his own house which was searched, and also to the deceased Silva's house. He admitted that when he was questioned about the murders he at first denied all knowledge of the matter ; later he made a lengthy statement disclosing all he knew.

It was accepted by the prosecution and the trial Judge that, on his own evidence, Daniel was a self-confessed accomplice who was well aware of the conspiracy he claims to have heard being hatched, and of the planning of the crimes that were going to be committed on the night in question. Daniel's character was attacked while he was under cross-examination. It appeared that complaints had been made against him of dynamiting fish ; molesting school girls (for which he had sent an apology to the Principal of the school) ; being drunk while on duty at the hospital ; and committing criminal intimidation.

He admitted that he had experience in the handling of firearms, and could shoot well. The defence suggested to him that it was he who had murdered Silva and Punchimahatmaya, and that one of the steps he took prior to committing that crime was to have his hair cut on the 19th August in order to disguise himself. Further suggestions made to him by the defence, which appeared to have the support of Daniel's statement to the Police, were that he had married on the 1st March, 1962, a woman who, he later came to know, had been intimate with a Police Constable called Gunasinghe ; that the deceased Silva had in his possession a letter (1 D 16) written prior to her marriage by Daniel's wife to Gunasinghe in very affectionate terms ; that Silva had refused to return the letter to Gunasinghe or to Daniel in spite of their request to him to return it.

Mr. Gratiaen, who appeared for the 1st, 2nd and 3rd accused-appellants, urged the following grounds of appeal :—

(1) that the Jury were misdirected and misled by the learned Commissioner of Assize in his charge, on a vital issue of law, viz. : (*a*) the proper approach to the evidence of an admitted accomplice ; and (*b*) what constitutes corroboration of an accomplice ;

(2) the learned Commissioner should have made it clear to the Jury that there was no independent evidence of corroboration. He had, instead, made them believe that what could not constitute corroboration was, in fact, corroboration ;

(3) the summing-up, as a whole, did not deal adequately with the evidence and was not fair to the accused ; and the facts were dealt with in such a way as to favour the prosecution theory ; and

(4) the case for the defence on the facts was not adequately placed before the Jury.

Counsel appearing for the other appellants supported Mr. Gratiaen's submissions on these points. We shall deal first with the 3rd and 4th submissions.

At the time of the murders there were pending in the Rural Court, Kalawana, two criminal cases filed by the 1st accused against Silva, charging

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him with gambling and permitting his premises to be used for gambling. Silva had obtained summons against the 1st accused's mother and sister to appear as witnesses for the defence at the trial, which had been fixed for August 24th. It was apparently suggested by the prosecution that this was a matter which would have made the 1st accused annoyed with Silva. A petition had also been sent by Silva, into which the Assistant Superintendent of Police had inquired. The learned Commissioner suggested many times to the Jury that feelings between Silva and the 1st accused were bitter as a result of these cases and summed-up his opinion by saying : " The simple question is, if the gambling case was a false case or if the petition was a false petition, then don't you think that the feelings were getting enraged, that they were angry ? Here, I am on the point of feelings. Now, gentlemen, if you are satisfied that there was this state of feelings, then, gentlemen, I think you should consider this matter of the letter in which Daniel was interested, the letter 1 D 16, in that setting ". The learned Commissioner then told the Jury that the letter was most probably written by Beeta, the wife of Daniel, to P.C. Gunasinghe in January, 1961 ; that Silva, who had the letter, would have thought it was a very useful document to use against P.C. Gunasinghe, when the latter gave evidence in the gambling cases ; that Gunasinghe and Daniel and 2nd accused had tried to get the letter from Silva, but the latter had refused to give it up.

He then asked the Jury to consider whether Daniel had tried to get the letter from Silva on his own account, or whether he had done so to help P.C. Gunasinghe, telling the Jury : " In those circumstances, gentlemen, was Daniel trying to get the letter for himself or was Daniel, in the setting I told you of, trying to get the letter to help the police officer, that is Gunasinghe ? It is a matter for your consideration ".

But he did not leave it to them to decide the matter for themselves, because he immediately thereafter said : " Then, gentlemen, if Daniel was getting the letter in those circumstances, trying to help Gunasinghe to get the letter back—the case was for the 24th August—do you think gentlemen that if Daniel was only doing that, there was this overpowering motive for Daniel to kill ? Daniel may have been annoyed that he did not get the letter he asked for, but do you think that in the proved circumstances, that Daniel would have an overpowering motive to kill ? Daniel may have been one who had a grievance with Silva, reason to be annoyed with Silva, but do you think that he was the person who had an over-powering motive to kill, in those circumstances ? Do you think, gentlemen, that if this woman had been intimate with a constable, that that fact would not have been known to a number of police officers and others. Do you think that it would be a possible source of shame to Daniel if it came out and this letter was read in Court ? It is a matter for you all who are now representing commonsense. "

The Jury were thus told in no uncertain terms : (1) that feelings between Silva and the Police were bitter ; (2) that Daniel was not personally interested in getting the letter from Silva, but was only trying to help P.C. Gunasinghe ; (3) that Daniel had no motive to kill Silva. This part of the summing-up ended by his saying : " Then, gentlemen, if you come to the conclusion that there was not an over-powering motive for Daniel to kill, then Gentlemen, what is the reason ? " He thus indicated to them plainly, on the logic of this reasoning, that there was no cause for Daniel to kill Silva. One assumption followed another, but each theory put forward was treated as proved, and the final conclusion then stated as though it was the only possible one.

The learned Commissioner then dealt with what he considered a glaring untruth in Daniel's evidence. He said : " I think you will not have a lot of difficulty in coming to the conclusion that Daniel is a liar when he says here he did not know about his wife's intimacy with Gunasinghe, that he knew nothing about it. Is there any reason, gentlemen, for Daniel giving false evidence on this point ? Well, gentlemen, this is one of the matters that you will consider on that matter. Daniel is aware, gentlemen, rightly or wrongly, that this letter will be treated as being the motive for the murder on his part because he was in search of this letter and he wanted this letter. So, is he now denying any knowledge of this intimacy and anything about it merely because he is afraid that if he admits it, then you can possibly come to the conclusion that he had a motive for the murder, which according to his own way of thinking, he never had. In other words, that a wrong impression would be created and this is the way of combating that wrong impression. You will remember, gentlemen, that a submission has been made to you by Mr. Chitty that Daniel has made peace with the prosecution by giving this evidence in this case. Mr. Chitty went on to

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explain that as far as his knowledge went nobody who has given evidence in this fashion has ever been charged with the offence, but you will remember this, that may be factually correct, but does Daniel know it ? Daniel has not been given any pardon. The Crown has been repeatedly saying that Daniel can be charged with murder. Probably it may not have happened before, but there can always be the first time to anything. So, gentlemen, it is a matter that you will have to consider whether that is an excuse for Daniel giving false evidence on that point. It is a matter for you to consider when you consider the credibility of Daniel. Do you think that is an explanation that you can accept, inferentially ? I mean by drawing inferences do you think that he is a man who has all these matters in mind and that you cannot believe him on any matter. As I told you, that is a matter again for you ". In this passage a strong point which the defence had made against Daniel's credibility was whittled down and the Jury were again clearly told that Daniel's untruthfulness was pardonable.

Daniel's demeanour in the witness-box was next dealt with by the learned Commissioner, who might surely have left it to the Jury to decide for themselves what impression his demeanour had made on them. But they were told this : " Now it has been proved that he was cross-examined by very eminent Counsel for many days in the Magistrate's Court If you think, gentlemen, that that ordeal, I advisedly use the word, ordeal, has had any effect on his reaction and his demeanour in this Court, you will give some allowance for it on that ground. I do not for a moment intend to tell you that cross-examination is not necessary. Cross-examination is very necessary because it is the one weapon by which the truth can be searched for and found out, but you will agree that whoever it is who has been searchingly cross-examined, even if he is a witness of the truth, that he is restrained. You will remember what Daniel said here. He said, ' Even in the Magistrate's Court I was cross-examined from morning till evening sometimes for hours together and during that time I may have faulted in giving answers '. That is what he said here." Then, after quoting at length from a part of the cross-examination, the learned Commissioner said : " Do you think or do you not think that it is possible for him to have made mistakes during that time. If you think that the length of his cross-examination may have made him to fault at times, that is a matter upon which you will give some allowance for him when you are assessing his credibility as a witness. That again is entirely a matter for you. I am merely telling you the excuse that the witness gave ".

The learned Commissioner then dealt with Daniel's account of the incidents of the night of 20th August. He pointed out he improbabilities of the story, viz., that the accused should have come to Daniel at all that night ; that after asking him to hit the barrel, they should have taken him away in the car, as though they wished him to get to know a number of details which he would not otherwise have learnt ; that there was no purpose in his hitting the barrel. These were very apposite comments, which should have made the Jury suspect the truth of Daniel's story. But the learned Commissioner proceeded to undo all the good he had thus done by then telling the Jury : " Now, first of all, gentlemen, if Daniel is telling a fabricated story, the defence position is that Daniel had time to think of what he was going to say ever since he took part in this incident. Naturally, gentlemen, Daniel took part in this incident. Whether he played a small part, as he says, or whether he played a much larger part, he played a part so that natural human instinct thereafter would be ' what am I going to say if I get caught '. Quite legitimately, the defence say that from the day of the incident right up to the time he had to make his statement he was thinking of what he had to say. Then gentlemen, do you think that these same points would not have struck Daniel if it struck all of us, if he had time to think. Do you think if he was fabricating a story—you saw Daniel in the box. He has been described to you by the defence, as a man of resource and ingenuity, and assuming you are of that same opinion, do you think he was so devoid of resources or ingenuity that he could not think of a story in which he becomes a witness without being involved in it. Remember, Daniel inculpates himself and as I said, if he was thinking of a false story, won't these very same points that appeared to be unusual strike him also ? " In other words, he told them that the very improbability of Daniel's story was a guarantee of its truth.

With regard to Daniel having had his hair cut, and the defence suggestion regarding that, the learned Commissioner again gave the Jury several reasons as to why they should not regard it as a suspicious circumstance against Daniel, and why they should accept Daniel's evidence on this point.

Daniel had said that on the night in question he saw 2nd and 3rd accused crossing a stile into

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Silva's garden. The defence had attacked his evidence on this point. The learned Commissioner dealt with this attack in the following passage : " There again, gentlemen, it is suggested that this is an artistic touch that Daniel sees these people just crossing the stile and not at any other point. It is a matter you will consider, but Gentlemen, you will consider if it is a case of wanting to implicate those people, why does he not say ' we took those two people, we dropped them and came back ? ' Why does he want to give this other version if he wants to falsely implicate those people ? Does he know the law regarding common intention ? Do you think that it was not simpler for him to say ' we took these two people and put them there ', instead of giving this story ? Gentlemen, you must, when you consider the story, consider it from the point of view whether it is true because if it is true, what can a man say except what he saw. What can he say except what he saw. You will consider whether it is a false story or a true story. Those are matters for your consideration".

The defence had suggested also that Daniel's evidence regarding the alleged meeting of 1st, 3rd, 4th, 5th and 6th accused at 6th accused's house was false. The learned Commissioner said on this point : " Now, gentlemen, is there anything unusual or improbable in people like that congregating once in a way at the house of one of them, specially in a distant outstation ? Is there anything unusual at such a gathering for them to drink and eat something in a way that the burden does not fall on one ? Do you think that the owner of the house should stand on his dignity and say, ' I am not going to allow you to bring any food. I am going to stand the cost of all that '. That is a matter for your consideration. Well, gentlemen, assuming that you come to the conclusion that there is nothing specially improper in a thing like that then gentlemen, do you think that it is something that cannot happen or most unlikely to happen that the 3rd accused, a gentlemen from Dehiwela, whose house is at Dehiwela, do you think that if there was such a meeting that there would be anything unusual in his walking in with a fowl in his hand? Is it that his status in life, whatever it is, would prevent him doing a thing like that or that it is below his dignity to wring its neck ? Well, gentlemen, as I said then, at such a meeting because there is a servant who does the normal cooking—we do not know how efficient his cooking is because there is no independent evidence on the point, we know that he is a boy of about 15 years of age, do you think it is an unlikely thing that a man who is better known as a cook is asked to give a little help on that particular day ? Daniel's evidence is this was not the first occasion on which he did a thing like that. A point is made that any one can boil a fowl and from the fact that Inspector has recorded Daniel as using the word, boil, it is sought to show that this is a false story. Assuming that the word that Daniel used is, boil, is it not possible that there are some people who can boil a fowl more tastily than others ? We do not know whether Surasena could boil a fowl. Daniel says that anybody can boil a fowl, but we do not know how competent Daniel is to say that. There is the cleaning and so many other things to do. So whatever it is Daniel says that is how he happened to come there and then, gentlemen, do you think that it is not possible that if these people had met there, that there was this talk going on ? I mean there is nothing to show that a plan had already been formed or that they met there to form a plan. That is nobody's evidence. All that Daniel says is that when he was there he overheard these snatches of conversation and in the light of what happened, he remembered these particular snatches of conversation. Do you think, gentlemen, that their having got together, having had some drinks, they were talking in that way and it was possible that they lost sight of Daniel being there ; that as soon as he was observed there, he was asked to go away by the 6th accused ? Is there anything inherently improbable in that story ? Do you think it could not have happened in that way ? If you think that it could not have happened in that way, then, of course, you reject the story. Otherwise what is there that is inherently improbable in that when you take into consideration the people who met there ? Is that something which never happens, for people like that to get together, contribute for the food, and is it something unusual for a person who is known as a cook to be called in there ? What is the point, gentlemen, in Daniel telling you that part of the story if he is fabricating something ? He has mentioned the story of the 20th in which he brings in eight persons. Here he mentioned the names of the 1st, 3rd, 4th, 5th and the 6th accused. Nothing said against the 6th accused on that occasion, nothing so far as I remember said against the 4th accused. The 1st accused is alleged to have said something, the 3rd accused is alleged to have said something and the 5th accused is alleged to have said something. Why should Daniel tell this story, gentlemen? Can you think of any reason if he is fabri-

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cating this story ? It has been commented in regard to Surasena that Daniel is anxious here not to reveal the fact that Surasena was there. Then, gentlemen, why did Daniel say in the Magistrate's Court that Surasena was there ? It is proved that he said that in the Magistrate's Court and he had accepted that and if it is something that he is wanting to hide, then why say that Surasena was there ? "

The points made by the defence against Daniel's evidence in regard to this meeting were not fairly dealt with in the summing-up. One point was that there was no reason for Daniel to be summoned by 6th accused to his house when the 6th accused's cook, Surasena, was available to prepare the dinner. Daniel at first denied that Surasena was in the house that evening, but after he had been confronted with his evidence in the Magistrate's Court he admitted that Surasena was, in fact, there. We should have thought that Daniel's veracity was shaken by this contradiction. But the learned Commissioner made no point of that at all. Instead, he treated the contradiction as a point in Daniel's favour, as it showed that Daniel did not try to conceal Surasena's presence in the house when he gave evidence in the lower Court. This was a quite unfair way of treating this contradiction. On this one matter Daniel should have been exposed as a scheming and bold liar, instead of which he was held up as a witness of truth. Another point made by the defence was that if Daniel did cook on that day, it was strange that he was not able to describe the position of the fireplace in the kitchen. The learned Commissioner's comment on this was : " Now, gentlemen, the other point in regard to this story was that Daniel is unable to tell you accurately where the fireplace in the kitchen is. You remember there was a built fireplace with bars across. Daniel's evidence is that he cooked on a kerosene oil cooker. If he went there and cooked on a kerosene oil cooker, does it necessarily follow he must observe the fireplace in the kitchen ? Is it that he is saying something false or is that faulty observation ? If a man goes there to cook and cooks on a kerosene oil cooker, must he necessarily remember the details of this room ? The moment he is questioned, he tries to guess. Is that an explanation ? It is a matter for your consideration that the defence says it is false. It is entirely a matter for you ".

Daniel's testimony in regard to the conversation which took place in the 6th accused's house between 1st, 3rd, 4th, 5th and 6th accused is the sole evidence of the conspiracy. The truth of Daniel's role as cook at the 6th accused's house, therefore, assumes the greatest importance. The attack on Daniel supported by the contradiction from the Magistrate's Court evidence is one of considerable substance and should have been put to the Jury in such a way as to make it quite open to them to believe or disbelieve him. The explanations given by the learned Commissioner and the emphasis laid by him on the side of the truthfulness of that evidence do not give us the impression that very much was left for the judgment of the Jury as to the credibility or otherwise of Daniel.

Thus it is clear that on Daniel's demeanour, his improbable story of what happened on the night of 20th August, the cutting of his hair, and his account of the alleged meeting of some of the accused in 6th accused's house, the learned Commissioner went to the defence of Daniel the accomplice, and had nothing favourable to say about the defence criticisms of Daniel's evidence on these matters.

Daniel was first questioned by the Police on the 12th September. One point on which he contradicted his evidence in the lower Court was whether he was first taken to his own house and then to Silva's house, or *vice versa*. The former version was given by him at the trial, the latter at the Magisterial inquiry. The Police version was that Daniel was first taken to his own house first. The learned Commissioner asked the Jury to consider whether this " mistake " made by Daniel might have been due to the lengthy cross-examination he underwent.

Again, it was proved that when Daniel was questioned by the Police he at first said that he knew nothing about the murders. On being questioned further, however, he said that he had not told the truth earlier, and he then related his version of the incidents. No point was made to the Jury, by the learned Commissioner, of the two contradictory positions adopted by Daniel when he was questioned by the Police. Instead, the Jury were only asked to decide at what stage Daniel was arrested—whether it was when the Police first met him that day, or at some later point of time.

The learned Commissioner then returned to the question of Daniel's credibility in the following passage : " Because the simple position still remains, has he fabricated this story having thought

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about it or has he told the truth ? And as I have told you already, if he has fabricated a story from the 20th of March up to 12th September, was he so devoid of ingenity that he must make himself a conspirator ; in other words, inculpate himself. I have already dealt with some of these points and it just struck me now about the story of the barrel and the fact that there was no dent on the barrel. If Daniel has invented this story of the barrel, do you or do you not think Daniel would see to it that there was a considerable dent on the barrel to show anyone ? You see it was submitted for the defence that if you hit a barrel with a stone with such force that there was bound to be a dent. Do you think or do you not that Daniel also would have reasoned in the same way ? Do you think that Daniel who went round with the police would not have taken the opportunity to take them and point out this dent on the barrel ? The evidence is that the barrel had no such dent ". The part played by the barrel had been dealt with previously, and it was hardly necessary to return to it to make this plea on Daniel's behalf.

The learned Commissioner next considered whether Daniel had any reason for implicating these particular accused, and found none. He next dealt with the evidence of a witness, Liyana Pathirana, who alone spoke to anything that could be termed corroboration of Daniel's evidence against 3rd, 4th, 5th and 8th accused. This witness spoke to having seen these four accused in a car at a point about 3/4th mile from the scene of offence, at about 2 a.m. on the morning of 21st August. The learned Commissioner asked the Jury to consider whether this evidence did not support the evidence of Daniel that these same four accused came in a car and met him about 12.30 a.m. that morning.

We have two comments to make at this point. The first is, that though the evidence of Liyana Pathirana could be considered corroboration, like all evidence it had to be weighed. It may be legally admissible for the purpose of corroboration, but its probative value as corroboration may be very slight or even nil. It cannot be said that Liyana Pathirana's evidence about 3rd, 4th, 5th and 8th accused went any great distance to connect or tend to connect these four accused with the offences charged, and to confirm in this way Daniel's evidence against them in a material particular. Apart from the fact that Liyana Pathirana, like Daniel, saw the four accused together in a car, there is nothing else in Pathirana's evidence to connect them with the offences—even if we overlook the intervals of space and time between the four accused meeting Daniel and Pathirana, respectively.

We do think, however, that at this stage in the summing-up, or even at a later stage, the learned Commissioner should have told the Jury in the clearest possible terms to bear in mind that Daniel's evidence against 1st, 2nd and 7th accused was not corroborated in any way by any witness. He failed to do so, and this was a grave omission on his part. It was not enough for him to have told them, as he did, that Pathirana's evidence only corroborated Daniel's story in regard to the 3rd, 4th, 5th and 8th accused. It was all the more necessary for him to tell them that it did not corroborate Daniel in respect of the other accused, because he referred to certain evidence given by the witnesses, Ariyawathie and Ekmon, as " corroboration of the general story related by Daniel ", or as enabling the Jury " to decide whether Daniel was truthful or was speaking a lie ", as has been suggested. A clear direction is always necessary, and cannot be too often repeated, that the corroboration that the law requires is corroboration in some material particular tending to show that *each* accused committed the crime charged. The absence of such a vital direction may have induced the Jury to attach undue weight to the corroboration of Daniel by Liyana Pathirana in regard to the 3rd, 4th, 5th and 8th accused, and to make use of that support to accept the evidence of Daniel even as regards the 1st, 2nd and 7th accused.

Apart from the evidence of Pathirana that he saw 3rd, 4th, 5th and 8th accused at about 2 a.m. on the 21st morning, the only corroborative evidence led in the case was against 6th accused. It was evidence given by witness, Podi Appuhamy to the effect that on the 21st August evening the 6th accused asked him to say that he saw the deceased Punchimahathmaya alive at 11 o'clock that morning. That evidence could be considered corroboration of Daniel's evidence because, in the absence of any explanation from 6th accused, it indicated that 6th accused was trying to fabricate evidence to show that the murder of Punchimahathmaya took place long after it had actually been committed.

On certain matters the learned Commissioner very fairly told the Jury that certain evidence should not be counted against the accused, *e.g.*, the alleged evidence of absconding ; a remark said to have been made by 6th accused that Silva had

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killed himself ; evidence that the accused had been seen together in a Club of which they were members ; or had been seen talking to each other.

The complaint that the summing-up was unfair to the accused is also borne out by the manner in which some of the necessary directions on matters of law were conveyed to the Jury, and by the omission to direct the Jury adequately on some matters of law.

In the directions concerning accomplice evidence, unusual stress was laid on the point that corroboration of such evidence is not an essential requirement. This point was frequently repeated, and it was emphasised by such language as " if you are so impressed by Daniel as a witness of truth, you are entitled to act on Daniel's evidence without going to see whether he is corroborated or not. *That is your legal right.* You are judges of fact. *Nobody can take it away* ". The learned Commissioner failed to stress the gravity of a decision to convict on uncorroborated accomplice evidence. These directions were a reflection of the very favourable view which the learned Commissioner had himself formed concerning Daniel. But having thus expressed himself, it became his duty to draw special attention to aspects of Daniel's conduct and evidence which could shake confidence in his credibility. Instead, as we have earlier shown, the discussions of factual matters were usually limited to explanations and suggestions conducive only to belief of Daniel's testimony.

A proper direction was given at an early stage regarding the approach to the evidence of a witness in a case where it is shown clearly that some part of his evidence is false. But the actual example mentioned in the direction was the case of the witness, William, who had given false evidence on an immaterial point, but whose evidence on another, apparently important matter, was in the opinion of the learned Commissioner very probably true. What was thus exemplified was that the falsity of one item of the evidence of William did not preclude belief of another item of his evidence. In the special circumstances of this case, however, the vital question was whether, if the accomplice Daniel's evidence was false on some material points, it would be safe to convict upon his testimony which was, in fact, very nearly uncorroborated. It was unfortunate that this question was not directly posed to the Jury, and if the Jury thought about it at all, the example actually available for their guidance was one which could only have induced an attitude favourable to the prosecution.

In the case of some of the accused, there was direct testimony from Daniel indicating the possibility that those accused were concerned in a conspiracy to kill the deceased Silva. In the case of the other accused, a finding on the count of conspiracy could depend only on an inference from the evidence of their alleged conduct on the night of the murders. The learned Commissioner did not, however, distinguish the cases of the two sets of accused persons on this ground. This omission might of itself suffice to vitiate the conviction of some of the accused on the first count of the indictment. But we here refer to the omission as being one of the indications that the mind of the learned Commissioner was not alive to matters favourable to the defence.

Looking at the charge to the Jury, as a whole, we have come to the conclusion that it was of such a character as to deprive the appellants of the substance of a fair trial—see *Broadhurst* v. *R.*, (1964) A.C. 441. We have pointed out that the learned Commissioner dealt with the attacks of the defence on Daniel's credibility in such a way as virtually to render such attacks harmless and important. It was particularly necessary that the Jury should make their own assessment of Daniel's credibility, as he was an accomplice whose evidence, by his admitted role of being an accomplice, was tainted. If the point of each attack made against his evidence was to be blunted by the learned Commissioner, the accused ran a grave risk of his uncorroborated evidence being acted upon, and that is what seems to have eventually happened in this case.

The learned Commissioner expressed his opinions very freely in his charge, and there is some ground for the complaint that the defence suggestions were not favourably or fairly dealt with. Lord Devlin, in the Privy Council judgment cited, pointed out that a jury is likely to pay great attention to the opinions of a presiding judge, and that is why those opinions should not be much stronger than the facts warrant.

It is always necessary to bear in mind that the power given to a trial Judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice. Although at the commencement of the summing-up the learned Commissioner made some preliminary observations which were

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extremely appropriate to a case of this nature, and which correctly directed the Jury on their proper function as judges of fact, we cannot escape the feeling that the total effect of his later strong expressions of opinion obliterated the good effect of the preliminary observations.

Finally, we quote the following words from that judgment as they express our view of the learned Commissioner's summing-up : " The summing-up, as a whole, cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant(s) (have) thus been deprived of the substance of a fair trial ".

For these reasons we allow the appeals and quash the conviction of the appellants. We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years since the commission of the offence, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution rests.

We accordingly direct that a judgment of acquittal be entered.

Convictions quashed and accused acquitted.

Present : **Sri Skanda Rajah, J., and Sirimane, J.**

DHAMMINDHA NAYAKA THERO *vs.* F. J. DIAS*

S.C. Application No. 476/64—*D.C. Colombo,* 781/*Z.*

Argued and decided on : 16th December, 1964.
Reasons delivered on : 13th January, 1965.

Stamp Ordinance, (*Cap.* 247)—*Certified copies of proceedings in District Court stamped according to value of* " *Class* " *of action as set out in Part II—Do such certified copies properly all under item* 24 *of Part I, Schedule A ?—Should they be stamped again when produced in law proceedings according to the* " *Class* " *of case and Court in which they are produced as set out in Part II of the Ordinance—Civil Procedure Code, section* 205.

Held : (1) That item 24 which appears in Part I of the Stamp Ordinance does not apply to certified copies of proceedings in Court which are specially provided for in Part II of the Ordinance.

(2) That a document which is properly stamped need not be stamped again when produced in Court proceedings.

H. V. Perera, Q.C., with *Miss Maureen Seneviratne,* for the petitioner.

J. G. T. Weeraratne, C.C., with *A. A. de Silva,* as *amicus curiae.*

SIRIMANE, J.

In this application for revision, the petitioner annexed certain certified copies of proceedings in a District Court case, certified by the Secretary of that Court, and stamped according to the value " class " of that action, as set out in Part II of the Stamp Ordinance, Chapter 247.

Section 205 of the Civil Procedure Code provides as follows :—

" Upon being paid such fee as the Court shall from time to time determine, the secretary or chief clerk of the Court shall at all times furnish to any person applying for the same, and supplying the necessary stamp, copies of the proceedings in any action, or any part thereof, or upon such application and production of such stamp shall examine and certify to the correctness of any such copies made by such person."

The Registrar of the Supreme Court had refused to accept these papers on the ground that they were not properly stamped. His contention, shortly, is as follows :—

Certified copies of documents issued by a public officer fall under Item 24 of Part I in schedule A to the Stamp Ordinance, which provides for a stamp duty of Re. 1/- on such a copy. He

* For Sinhala translation, see Sinhala section, Vol. 10 part 5, p. 17.

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contends that thereafter, when such certified copies are produced in Law proceedings they should be stamped again according to the Class of the case and the Court in which they are produced, as set out in Part II of the Stamp Ordinance. The proctor for the petitioner has contested the correctness of the Registrar's contention, and has submitted that the certified copies have been correctly stamped by the certifying Officer, and that no further stamping is necessary.

The question whether these exhibits have been correctly stamped has been referred to us.

Item 24 referred to above reads as follows :—

"24. Copy or extract, certified, of any document issued by a Public Officer not otherwise specially provided for .. .. 1.00"

The item appears in Part I of Schedule A, the heading of which reads as follows :—

"Containing the duties on instruments of conveyance contracts, obligations, and security for money ; on deeds in general and on other instruments, matters and things not falling under parts II, III, IV and V."

Item 33 in Part II under the heading "In the District Court", is as follows :—

"33. Copy duly certified of all matters of record not otherwise provided for . . ." the different stamp duties according to the class of the case are then set out.

I think it is clear that item 24 which appears in Part I does not apply to certified copies of proceedings in Court which are specially provided for in Part II.

A document which is properly stamped need not be stamped again when produced in Court proceedings.

Item 11 in Part III which applies to stamp duties on documents produced in the Supreme Court provides for the payment of duty on an "Exhibit of every document on which no stamp is affixed or impressed unless the duplicate bears a stamp".

Item 32 makes a similar provision for documents produced in the District Court.

The learned Crown Counsel whose assistance at the argument we thankfully acknowledge, while placing before us the Registrar's point of view, also drew our attention to the fact that Item 24 was introduced only in 1919 by Ordinance No. 32 of that year, while duties on Law proceedings were provided for, even as far back as 1890 (*see* Schedule to Stamp Ordinance 3 of 1890).

For these reasons we are of the view that the exhibits in this case have been correctly stamped and should be accepted.

SRI SKANDA RAJAH, J.
I agree.

Exhibits held to be correctly stamped.

Present : **Sansoni, C.J., and Tambiah, J.**

N. H. THERUNNANSE *vs.* K. ANDRAYAS APPU & THREE OTHERS*

S.C. No. 109/'64 *(F)—D.C. Galle, No.* 6240/*L.*

Argued on : May 11, 1965.
Decided on : May 21, 1965.

Buddhist Temporalities Ordinance, (*Cap.* 318), *sections* 4, 18, 20 *and* 26—*Seizure of Sanghika property by Fiscal in execution of writ—Claim by senior pupil of Viharadhipathi as Sangika property—Dismissal of claim—Action filed under section* 247 *of Civil Procedure Code—His status to maintain it.*

In execution of a decree entered against a Viharadhipathi of a temple the Fiscal seized a certain property to which the plaintiff preferred a claim on the ground—

(*a*) that he was the senior pupil of the Viharadhipathi ;

(*b*) that the property could not be seized because it was *Sanghika* property.

* For Sinhala translation, see Sinhala section, Vol. 10 part 5, p. 18.

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On his claim being dismissed the plaintiff instituted this action under section 247 of the Civil Procedure Code. This action was dismissed on the ground that the property had not vested in him and, therefore, had no status to maintain it.

Held : (1) That the plaintiff not being a Viharadhipathi had no status to file this action, because by section 20 of the Buddhist Temporalities Ordinance, all property belonging to a temple vests in the Viharadhipathi.

(2) That the plaintiff's right to make a claim against the Viharadhipathi for his maintenance from the common store of the Vihara is a personal right against the Viharadhipathi and not a right in the land.

(3) That section 26 of the Buddhist Temporalities Ordinance does not prohibit the seizure of a temple land in execution.

H. W. Jayawardene, Q.C., with *Ralph de Silva* and *I. S. de Silva*, for the plaintiff-appellant.

J. W. Subasinghe, for the 1st to 3rd defendant-respondents.

SANSONI, C.J.

This is an action filed under section 247 of the Civil Procedure Code by an unsuccessful claimant.

The plaintiff is the senior pupil of Walawe Pemaratana Thero, the Viharadhipati of Paragoda Raja Maha Vihara. The latter as such Viharadhipati brought an action in the D.C. Galle, Case No. L 5753, against the present 1st, 2nd and 3rd defendants for a declaration of title to lot C of Tiruwanaketiya Pansalawatte. The case was settled by the entering of a consent decree whereby the 1st and 2nd defendants and five others were declared entitled to that lot C and were also awarded a sum of Rs. 500/- as costs against the present 4th defendant.

In execution of that decree and to recover the sum of Rs. 500/- the judgment-creditors caused the Fiscal to seize lot D which adjoins lot C. The present plaintiff preferred a claim to lot D on the grounds that he was the senior pupil of the Viharadhipati and the lot could not be seized because it was *Sanghika* property. His claim was dismissed and he brought the present action.

The learned Additional District Judge dismissed the action on the ground that the plaintiff had no status to maintain it, as the property was not vested in him and he has no right, title or interest recognizable in law to the property seized.

It is not in dispute that the lot seized is part of the temporalities of the Vihara, and is *Sanghika* property. The principal question we have to decide is whether the plaintiff, who is not the Viharadhipati, has any right to the land seized which would enable him to say that the land should not be sold in execution of the decree entered against the Viharadhipati.

Section 20 of the Buddhist Temporalities Ordinance, Cap. 318, reads :—

"All property, movable and immovable, belonging or in anywise appertaining to or appropriated to the use of any temple, together with all the issues, rents, moneys, and profits of the same, and all offerings made for the use of such temple other than the *pudgalika* offerings which are offered for the exclusive personal use of any individual bhikkhu, shall vest in the trustee or the controlling viharadhipati for the time being of such temple, subject, however, to any leases and other tenancies, charges, and incumbrances already affecting any such immovable property."

This section enlarges the interest which section 4 vested in the Viharadhipati. That section reads :—

"(1) The management of the property belonging to every temple not exempted from the operation of this sub-section shall be vested in a person or persons duly appointed trustee under the provisions of the Ordinance.

"(2) The management of the property belonging to every temple exempted from the operation of the last preceding sub-section but not exempted from the operation of the entire Ordinance shall be vested in the Viharadhipati of such temple, hereinafter referred to as the "controlling Viharadhipathi."

In view of the very clear words of section 20 we are unable to uphold Mr. Jayawardene's argument that the plaintiff, because he is a pupil of the Viharadhipathi, has some right in this temple property. No doubt, he has a right to make a claim against the Viharadhipati that he is entitled

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maintenance from the common store of the Vihara. The Viharadhipati would use the rents and profits of the temple lands to meet such a claim. But that right which a priest has is a personal right against the Viharadhipati and not a right in the land.

Mr. Jayawardene's submission that the sale of property belonging to a temple is now governed by section 26 of the Ordinance is correct. Section 26 reads :—

" No mortgage, sale or other alienation of immovable property belonging to any temple, shall be valid or of any effect in law :

Provided that this section shall not apply either to a *paraveni pangu* or to a sale in execution of any property if the writ for the seizure thereof was issued after written notice of three months to the Public Trustee."

It will be seen that the proper time for applying the provisions of section 26 so far as this action is concerned, would be after the impugned mortgage sale or other alienation has taken place. Section 26 does not prohibit the seizure of a temple land in execution. It is common ground that no written notice was given to the Public Trustee, but even this circumstance does not help the plaintiff.

The section does, however, contemplate the seizure and sale of temple land in execution of a writ. Section 18 which is relevant to this question enables a controlling Viharadhipati of a temple to sue under the name and style of " trustee of—temple " for the recovery of any property vested in him under the Ordinance, as the 4th defendant did in Case No. L 5753. No objection can be taken here to the decree entered in that action, although Mr. Jayawardene seemed to suggest that it was a collusive one.

We need say no more, except that we agree with the learned Judge's finding that the plaintiff had no status to file the present action, because section 2 says in unmistakable terms that all property belonging to a temple vests in the Viharadhipati.

The appeal is dismissed with costs.

TAMBIAH, J.
I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : **H. N. G. Fernando, S.P.J., (President), T. S. Fernando, J., and Tambiah, J.**

THE QUEEN *vs.* V. V. BRAMPY SINGHO *alias* RIATHAN

Appeal No. 24/1965—*Application No.* 27/1965—*S.C. No.* 255—*M.C. Avissawella,* 53392.

Argued on : 26th May, 1965.
Decided on : 26th May, 1965.
Reasons on : 21st June, 1965.

Penal Code, section 352—Kidnapping from lawful guardianship—Nature of kidnapping contemplated under the section—Necessity for clearly defined evidence in proof of offence.

Held : That in order to establish an offence under section 352 of the Penal Code, it is not sufficient to show that restraint, as contemplated in this section, was exercised in the course of the commission of another offence. The act of restraint should be distinguishable to the extent that the act of kidnapping must be completed before the other act is committed or should be capable of completion even if the other intended act is not actually committed.

Miss Manouri de Silva with *D. S. Jayalath* (*assigned*), for the accused-appellant.

P. Colin Thome, C.C., for the Crown.

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H. N. G. Fernando, S.P.J.

The appellant was convicted on two counts, the first of kidnapping a girl under 16 from lawful guardianship in order that she be subject to unnatural lust, and the second of the offence under section 345 of the Penal Code of using criminal force on her with intent to outrage her modesty. After hearing the arguments of counsel we set aside the conviction and sentence on count one. We now state our reasons.

On the day of the incident, the girl had left home with her little brother to bathe at a well some distance away. After the girl had bathed and worn her frock, the appellant, who was quite well known to the girl, came to the well and told the little boy to go home with the bucket used for the bath ; thereafter he called the girl to go and pick firewood. The girl accompanied the appellant to some land near an *ela*, and there both picked up firewood. After some little time, the appellant placed a gunny sack on a rock, and having made the girl on the sack, he committed the offence charged in count two. In doing so, he held her down with hands, so that she was unable to prevent the assault on her person.

In directing the Jury as to the evidence relevant to the charge of kidnapping, the learned Commissioner did not suggest that the appellant could be held to have enticed the girl away from the custody of her parents at the commencement of the incident, that is when the appellant called the girl to go and pick firewood. The learned Commissioner thought perhaps rightly that the evidence did not suffice to establish a taking or enticement at that stage. Instead the Jury were directed as follows :—" If at any time she could have returned to her guardian, then there was no restraint with her freedom and there was no interference with the custody of the guardian, but if she was taken and if she did not have the opportunity of returning to her guardian at any moment she wanted, then there was an interference and there was a taking away from the keeping of her guardian but it is not a matter for how long or short a time her freedom was restricted. The time may be ever so short, still if she was taken away even for a brief period of time, if her freedom to return to her guardian was interrupted or restricted, then there was a taking away from the keeping of her guardian ."

According to this direction, any restraint, whatever may be its immediate purpose, and however momentary, which interrupts or restricts the capacity of a child freely to return to her guardian's custody would constitute kidnapping. The direction would cover a case in which a child is held by the hand or shoulder with the object that she may be slapped, or even reprimanded. It would perhaps also cover the example suggested by counsel for the appellant, namely, a case where a child is molested in her own house, and is momentarily restrained in the course of the molestation.

Such restraint as the appellant did impose on the girl in this case was only incidental to the offence of using criminal force. The element of restraint in that sense would probably be present in nearly every case of an offence under section 345 of the Code against a young child. But it does not follow that the offence of kidnapping is established in every such case. The latter offence is a distinct one requiring proof of facts different from those which are in issue on the charge under section 345. The language of sections 355 to 360 makes this distinction clear. The kidnapping has to be " in order to " or " with intent to " the commission of some other act, so that the act of kidnapping must be completed even if the other intended act is not actually committed.

The distinction is very well illustrated by section 356, which prescribes the punishment for kidnapping a person with intent to wrongfully confine that person. To establish the charge of kidnapping under that section, it would not suffice to prove only the act of wrongful confinement already punishable under section 333.

In our opinion the proper direction to the Jury in this case should have been that while the evidence relating to the actual criminal assault on the girl was relevant to establish the object which the appellant may have had in mind, it was not relevant to the preliminary and distinct question whether he kidnapped the child in order to achieve his object. It is apparent that, in the Commissioner's own view of the evidence, the appellant would probably have been acquitted if the proper direction had been given.

Conviction on count one quashed.

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IN THE COURT OF CRIMINAL APPEAL

Present : **T. S. Fernando, J., (President), Sri Skanda Rajah, J., and Sirimane, J.**

G. K. ARIYADASA *vs.* THE QUEEN

C.C.A. Appeal, No. 124 *of* 1964 (*with Application, No.* 138 *of* 1964)
S.C. No. 28—*M.C. Galle, No.* 29805.

Argued and decided on : 18th January, 1965.
Reasons delivered on : 1st February, 1965.

Burden of Proof—Duty of prosecution to prove the charge—Absence of any burden on the accused to prove his innocence.

Common intention—Failure to allege vicarious liability in the charge—Effect thereof—Criminal Procedure Code, sections 167, 168, 169—*Penal Code, section* 32.

(*A*) Where, in a trial for murder, the accused did not seek to bring himself within the benefit of a general or special exception in the Penal Code, but instead, sought by his evidence to establish that the deceased met with his death at the hands of a third party, the learned Judge's summing up contained the following passages :—

(i) " Now, gentlemen, the degree of proof that is required from the defence is not so high as the degree of proof that is required from the Crown. Whereas the Crown has to prove its case beyond reasonable doubt, it is sufficient if the defence proves its case on a balance of probability. If you think that the version of the accused is more probable than the version related by the prosecution witnesses, the defence has discharged its burden. That is the burden that lies upon the defence to prove its case."

(ii) " I have addressed you on the burden of proof that lies upon the defence and I said that it is not necessary that the accused should prove his case with that same high degree of proof that is required of the Crown ; but still he has to prove it. You must be satisfied on his evidence that what he is saying is true."

(iii) " The case for the defence is that it was Jamis who struck the fatal blow on the deceased. Then, gentlemen, you have to consider whether the accused's story on that point is true. If you are satisfied, on a balance of probability, that it was Jamis who struck the deceased, then the accused is entitled to be acquitted, because it was not he who caused the fatal injury on the deceased. . . So, gentlemen, you will see that the entire case boils down to a very small issue; do we believe Sopihamy or do we believe the accused ? "

Held : That the learned Judge has misdirected the Jury on the question of the burden of proof.

Per T. S. FERNANDO, J.—" It appeared to us that when the learned judge put the issue in the case as one of belief between the evidence of Sopihamy on the one hand and that of the appellant, on the other, he was placing on the appellant a burden which the latter was not obliged in law to carry. If the jury believed the appellant, he was, of course, entitled to be acquitted. He was, in our opinion, also entitled to be acquitted even if his evidence, though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt. The evidence he gave at the trial did not affect the cardinal principle of the criminal law that the accused person is presumed to be innocent and the corollary of that principle that the burden of establishing his guilt lay on the prosecution. In the state of the evidence the burden of proof did not shift on to the appellant at any stage of this case."

(*B*) The case for the prosecution was that the appellant inveigled the deceased out of his home on the night in question on a pretext of giving him liquor to drink, that the appellant and Jamis both came together to the deceased's home to take him away and that when he had been taken into the compound of the appellant he was subjected to a severe assault from which he died in that compound itself. The medical evidence was to the effect that the deceased had sustained a number of injuries which could not all have been caused with one weapon but must have been caused with, at least, two weapons, one blunt and the other sharp cutting. The fatal injury was due to a blow with a blunt weapon and, if more than one person had taken part in the assault upon the deceased, the prosecution was not able to establish that it was the appellant and not some other person who had caused that injury.

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The charge contained in the indictment was in the following terms :—

> " That on or about the 1st day of October, 1963, at Kirindallahena, Lewala Pahala, in the division of Galle, within the jurisdiction of this Court, you did commit murder by causing the death of Elpitiya Vithanage David, and that you have thereby committed an offence punishable under section 296 of the Penal Code."

Counsel for the appellant argued that he was called upon according to the terms in which the charge had been framed only to meet a case where the allegation was that the death of the deceased was caused by him, and that, in the absence of any reference to section 32 of the Penal Code in the charge itself, he was not required to defend himself on a charge which implied that he was vicariously responsible for the criminal act of another.

Counsel for the Crown submitted that section 169 of the Criminal Procedure Code read with its illustration indicated that a charge such as the one in the present case was in conformity with the law.

Held : That the charge as framed gave the appellant, having regard to the circumstances of this case, such particulars of the charge as he was entitled at law to receive.

Not followed : *The Queen* v. *Mudalihamy*, (1957) 59 N.L.R. 299.

Case referred to : *Ramlochan* v. *The Queen*, (1956) A.C. 475.

K. Jeganathan with *J. V. C. Nathaniel*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

T. S. FERNANDO, J.

Two grounds of appeal were raised on behalf of the appellant who had been convicted upon the unanimous verdict of the jury that he was guilty of the murder of a man named David. The first of these grounds was that the jury had been misdirected in respect of the burden of proof arising in a criminal case where the defence does not seek to prove the existence of circumstances bringing its case within a general or special exception of the Penal Code. The second ground alleged that there was a misdirection of the jury inasmuch as the trial judge left it open to them to return a verdict against the appellant on the basis that the fatal injury to the deceased was caused by a person other than the appellant but in furtherance of an intention shared in common between the appellant and that other person, although the charge as framed in the indictment contained no reference at all to section 32 of the Penal Code.

The prosecution relied solely on circumstantial evidence to establish the charge of murder. That evidence was furnished mainly by the deceased's mother, the witness, Sopihamy. In regard to the first of the two grounds of appeal, it may be stated that the appellant did not seek to bring himself within the benefit of a general or special exception in the Penal Code. Instead, by his evidence he sought to establish that the deceased met with his death at the hands of a man called Jamis. It is correct to say that he sought also to establish that this man Jamis and the deceased broke into his house on the night in question in an attempt either to abduct his daughter or to commit an assault on her and that, on his intervening to save his daughter and inflicting a knife injury on the deceased in the course of that intervention, Jamis and the deceased ran out. It was thereafter, he stated, that Jamis and the deceased quarrelled between themselves and that Jamis struck the deceased on his head with a crow-bar. According to medical testimony, the necessarily fatal injury was one which the deceased had sustained as a result of a blow on his head with a blunt weapon. While the appellant may, therefore, be said to have claimed he was exercising the right he had at law to defend his daughter, he nevertheless did not plead that any injury other than a knife injury and another slight injury to the forehead of the deceased was caused by him in the course of the exercise by him of that right.

The learned trial judge, at a fairly early stage of his charge, having explained to the jury that the Crown had to prove its case beyond reasonable doubt, stated as follows :—

> " Now, gentlemen, the degree of proof that is required from the defence is not so high as the degree of proof that is required from the Crown. Whereas the Crown has to prove its case beyond reasonable doubt, it is sufficient if the defence proves its case on a balance of probability. If you think that the version of the accused is more probable than the version related by the prosecution witnesses, the defence has discharged its burden. That is the burden that lies upon the defence to prove its case."

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Then, again, in the middle of his charge, he reverted to the question of the burden of proof lying on the defence in the following words :—

> "I have addressed you on the burden of proof—(obviously a reference to the passage reproduced above)—that lies upon the defence and I said that it is not necessary that the accused should prove his case with that same high degree of proof that is required of the Crown ; but still he has to prove it. You must be satisfied on his evidence that what he is saying is true."

Finally, towards the close of his charge, he directed the jury thus :—

> "The case of the defence is that it was Jamis who struck the fatal blow on the deceased. Then, gentlemen, you have to consider whether the accused's story on that point is true. If you are satisfied, on a balance of probability, that it was Jamis who struck the deceased, then the accused is entitled to be acquitted, because it was not he who caused the fatal injury on the deceased . . . So, gentlemen, you will see that the entire case boils down to a very small issue ; do we believe Sopihamy or do we believe the accused ?"

It appeared to us that when the learned judge put the issue in the case as one of belief between the evidence of Sopihamy, on the one hand, and that of the appellant, on the other, he was placing on the appellant a burden which the latter was not obliged in law to carry. If the jury believed the appellant, he was, of course, entitled to be acquitted. He was, in our opinion, also entitled to be acquitted even if his evidence, though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt. The evidence he gave at the trial did not affect the cardinal principle of the criminal law that the accused person is presumed to be innocent and the corollary of that principle that the burden of establishing his guilt lay on the prosecution. In the state of the evidence the burden of proof did not shift on to the appellant at any stage of this case. Moreover, as is evident from the passages in the learned judge's charge which we have thought necessary to quote above, the jury might well have approached their deliberations in respect of the guilt or innocence of the accused on the assumption that an accused person who has denied his guilt and thereby thrown the burden of establishing it on the prosecution yet himself had attached to him at law a burden of proving his innocence on a balance of evidence. The directions complained of were, in our opinion, clearly erroneous and the first ground of appeal had to be upheld.

In view of the conclusion we reached on the first ground on which misdirection was alleged, we allowed the appeal at the conclusion of the argument and we quashed the conviction. Acting, however, in terms of the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance we ordered a new trial of the appellant as we were of opinion that there was evidence before the jury upon which the appellant might reasonably have been convicted but for the misdirection established. Although the upholding of the first ground raised disposed of the appeal, as we have ordered a new trial, we think it is necessary to deal also with the second ground of appeal.

For the consideration of this second ground of appeal, one or two relevant facts have to be recounted. The case for the prosecution was that the appellant inveigled the deceased out of his home on the night in question on a pretext of giving him liquor to drink, that the appellant and Jamis both came together to the deceased's home to take him away and that when he had been taken into the compound of the appellant he was subjected to a severe assault from which he died in that compound itself. The medical evidence was to the effect that the deceased had sustained a number of injuries which could not all have been caused with one weapon but must have been caused with, at least, two weapons, one blunt and the other sharp cutting. The fatal injury was due to a blow with a blunt weapon, and if more than one person had taken part in the assault upon the deceased, the prosecution was not able to establish that it was the appellant and not some other person who had caused that injury. Being a case of circumstantial evidence, the prosecution appears to have put forward alternate theories as to how the deceased might have come by his injuries, namely, either that the appellant himself caused the fatal injury or that Jamis or some other person caused that injury but the appellant participated in the attack sharing an intention in common with Jamis or that other person to kill the deceased.

The defence apparently contended at the trial that, if two persons attacked the deceased, and if the prosecution failed to establish the identity of the person who actually delivered the fatal blow, the appellant was entitled to be acquitted. In regard to this contention, the trial judge directed the jury that if they were satisfied beyond a reasonable doubt that the deceased was lured or inveigled on to the compound of the appellant by the latter and Jamis on a false pretext and was there fatally assaulted soon afterwards "it matters not who it was who inflicted the fatal injury". He further directed them that "it is equally possible for you

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to bring in a verdict of murder if you are convinced—quite convinced—by the evidence that the accused was a party to a carefully prepared plot, in accordance with a common plan, that the deceased should be brought to his compound some way or other and assaulted fatally by the conspirator in pursuance of that common plan to kill. It matters not if there was another person who participated in the assault on the deceased. It matters not even if the fatal blow was not delivered by the accused. If you are satisfied beyond reasonable doubt that Jamis and the accused took part in the assault in furtherance of a common criminal purpose of causing the death of the deceased and that one of them struck the fatal blow, even if it was not the accused, then the accused will be guilty of the offence of murder ". The learned judge reverted to this same matter towards the end of his charge when he stated " I told you that if you are satisfied that the deceased had been inveigled into the compound by the accused and Jamis, it matters not who struck the fatal blow provided there was a common plan between the accused and Jamis to attack the deceased ".

The charge contained in the indictment was in the terms reproduced below :—

> " That on or about the 1st day of October, 1963, at Kirindallahena, Lewala Pahala, in the division of Galle, within the jurisdiction of this Court, you did commit murder by causing the death of Elpitiya Vithanage David, and that you have thereby committed an offence punishable under section 296 of the Penal Code."

The argument for the appellant in respect of the second ground of appeal was that he was called upon according to the terms in which the charge had been framed only to meet a case where the allegation was that the death of the deceased was caused by him, and that, in the absence to any reference to section 32 of the Penal Code in the charge itself, he was not required to defend himself on a charge which implied that he was vicariously responsible for the criminal act of another. Support for this argument was sought from the decision of this Court in *The Queen* v. *Mudalihamy*, (1957) 59 N.L.R. 299. In that case Basnayake, C.J., said in the course of the judgment of the Court—(*see* p. 302)—

> " There was no indication in the indictment that the appellant was being made vicariously liable for the death of the deceased. It contained a straight forward charge which alleged that the appellant committed murder by causing the death of the deceased . . Although the indictment gives the offence with which the accused was charged, the time and place of the alleged offence, and the person against whom it was committed, those particulars were not in our opinion reasonably sufficient to indicate to the appellant the ground on which it was sought to bring home guilt to him."

There followed a reference to the requirements of section 169 and to the provisions of sections 167 and 168 of the Criminal Procedure Code.

Section 167 (2) of the Criminal Procedure Code enacts that " if the law which creates the offence gives it any specific name, the offence may be described by that name only ". The Penal Code (section 294) gives the specific name of murder to the offence here in question. Section 168 (1) sets out what particulars shall be contained in the charge. These particulars are required to be such as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 169 sets out the circumstances in which the manner of committing the offence has to be particularised in the charge. Mr. Pullenayegum has drawn our attention to illustrations (*b*) and (*e*) to that section. These two illustrations appear in the Code in the form reproduced hereunder :—

(*b*) *A*. is accused of cheating *B*. at a given time and place. The charge must set out the manner in which *A*. cheated *B*.

(*e*) *A*. is accused of the murder of *B*. at a given time and place. The charge need not state the manner in which *A*. murdered *B*.

Mr. Pullenayegum submitted that when the Court in *Mudalihamy's case* (*supra*)—*see* p. 303—stated that, in a case where it is sought to make a person vicariously responsible for the acts of those who are not being charged at all, it was necessary that the accused should have been made aware at the outset that it was a charge of vicarious liability (with a specific reference in the charge to section 32 of the Penal Code), the law has been laid down in a manner that is in conflict with the Criminal Procedure Code. In the opinion of the majority of us, the Court in *Mudalihamy's case*, with all respect to it, appears to have overlooked the significance of the illustrations (*b*) and (*e*) to section 169 which we have produced above. That section in combination with its illustrations serves to show that a charge such as that framed in the present case against the appellant was in conformity with the law. Moreover, section 32 of the Penal Code merely lays down a principle of liability, and not a manner of committing an offence. The majority of the Court was fortified in the view which commended itself to them

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when they examined the decision of the Privy Council in the West Indian case of *Ramlochan* v. *The Queen*, (1956) A.C. 475, which had, indeed, been brought to the attention also of the Court in *Mudalihamy's case*.

The Court of Criminal Appeal thought that this decision of the Privy Council had no application to the facts in *Mudalihamy's case* for the reason, *inter alia*, that it was not one in which it was sought to make the accused vicariously liable for the criminal act of another not before the Court. With all respect to the Court and to the reasons set out in its judgment for distinguishing *Ramlochan's case*, the majority of us were unable to agree that the purported distinction is a valid one. Our reasons are apparent from a close examination of the judgment of Their Lordships of the Judicial Committee.

In that case the appellant, Ramlochan, had been charged with murder. The evidence was circumstantial, and right up to the stage when Ramlochan, who testified on his own behalf, came to be cross-examined, the case for the Crown had been that Ramlochan himself had killed the deceased. In the course of the cross-examination of Ramlochan by counsel for the Crown, the latter suggested to the witness that the fatal blow was struck not by him (Ramlochan), but by another man—who was not on trial—and that the appellant aided and abetted this other man. It was contended on behalf of Ramlochan that improper prejudice had been caused to his defence by this alleged change of front on the part of the Crown. As to this, the Court observed :—

"Their Lordships are unable to take the view that there was any illegitimate or improper exercise of counsel's right and duty to cross-examine the accused. The Crown case was that the accused had murdered this girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or not the accused, if he carried out the murder, was assisted by someone else was another unknown feature in the case. Whether the accused himself struck off the girl's head or was a party to someone else doing so was immaterial. In either case he was guilty of murder . . .

Nor are Their Lordships able to see that there was any change of front in the conduct of the case by the prosecution. The Crown was not bound to state its theories in advance. These theories were inferences from evidence which it may be assumed Crown Counsel explained to the jury in opening that he was about to lead. Their Lordships are unable to extract from the evidence led for the prosecution that the Crown had tied itself to any view of how the murder was committed."

For reasons which have been outlined above the majority of us were unable to agree with the observations of this Court in *Mudalihamy's case* and uphold the second ground of appeal. In the opinion of the majority of the Court (1) the charge as framed gave the appellant, having regard to the circumstances of this case, such particulars of the charge as he was entitled at law to receive, and (2) there was neither prejudice to him nor misdirection by the trial judge.

Re-trial ordered.

INQUIRY INTO ELECTION PETITION, No. 22/65.

ELECTORAL DISTRICT, NO. 6—HABARADUWA.

Present : **Abeyesundere, J.**

DANISTER DE SILVA *vs.* PRINS GUNASEKERA

Argued and decided on : 28th September, 1965.

Ceylon (*Parliamentary Elections*) *Order-in-Council*, 1946—*Parliamentary Election Rules, Rule* 4 (1) (*b*)—*Facts and grounds—Rule* 12 (2)—*Adequacy of security—Number of charges—Motion for dismissal of petition for insufficiency of security.*

Held : (1) That it was sufficient compliance with the provisions of rule 4 (1) (*b*) if the petitioner has, in a single averment, stated both facts and grounds relied on to sustain the prayer.

(2) That an averment as to the commission of an offence by persons in the alternative does not offend rule 4 (1) (*b*).

(3) That the expression " charges " in rule 12 (2) refers to various forms of misconduct coming under the description of corrupt or illegal practices under the Ordinance.

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(4) That the allegation of bribery, being a corrupt practice under section 58 of the Ordinance, constitutes a charge, and although several instances or causes of bribery may be alleged, they would constitute but one charge for the purposes of rule 12 (2).

Followed: *Tillekewardene* vs. *Obeysekera*, 33 N.L.R. 65; 1 C.L.W. 12.
Perera vs. *Jayawardene*, 49 N.L.R. 1; XXXV C.L.W. 105.

E. R. S. R. Coomaraswamy with *K. Shinya*, *George Rajapakse*, *K. Shanmugalingam* and *J. R. Karunaratne*, for the respondent-petitioner.

George E. Chitty, Q.C., with *E. A. G. de Silva*, *S. S. Basnayake*, *Varuna Basnayake*, *C. A. Amerasinghe* and *Ajit Wijeywardene* for the petitioner-respondent.

N. Kanagasunderam, Crown Counsel, with *N. B. D. S. Wijesekera, Crown Counsel*, for the 2nd and 3rd respondents.

Abeyesundere, J.

Franciska Badaturuge Danister De Silva, hereinafter referred to as the petitioner, has presented to the Supreme Court an election petition, hereinafter referred to as the election petition, against the election of Prins Gunasekera as Member of Parliament for the Electoral District of Habaraduwa at the General Election held on 22nd of March, 1965, hereinafter referred to as the respondent.

It is alleged by the respondent that paragraphs 5 and 6 of the election petition are respectively a mere repetition of the grounds of avoidance of an election set out in section 77 (*b*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, and a vague and general reference to the offence of bribery set out in section 57 of that Order-in-Council and that, therefore, the petitioner has failed to comply with the provisions of Rule 4 (1) (*b*) of the Parliamentary Election Petition Rules, 1946. The respondent also alleges that the petitioner has failed to deposit the amount of security required by Rule 12 of the Parliamentary Election Petition Rules, 1946, and that consequently no further proceedings can be had on the election petition. On the said allegations the respondent prays for the dismissal of the election petition.

The said Rule 4 (1) (*b*) provides that an election petition shall state the holding and result of the election and briefly state the facts and grounds relied on to sustain the prayer. It is contended on behalf of the respondent that, although paragraphs 5 and 6 of the election petition contain grounds relied on to sustain the prayer in that petition, there is no statement of the facts.

In paragraph 5 of the election petition there is the statement of the petitioner that the election of the respondent is null and void on the ground of such non-compliance with the provisions of the said Order-in-Council relating to elections as has affected the result of the election. That statement is a brief statement of both a fact and a ground relied on by the petitioner to sustain the prayer in the election petition.

Paragraph 6 of the election petition contains the statement that the respondent, or his agent, or agents others with his knowledge or consent committed in connection with the election the corrupt practice of bribery within the meaning of section 57 of the said Order-in-Council. That statement is a brief statement of both a fact and a ground relied on by the petitioner to sustain the prayer in the election petition. The fact that persons in the alternative are described in the said paragraph 6 as having committed the corrupt practice of bribery does not offend the said Rule 4 (1) (*b*).

For the aforesaid reasons I hold that, in regard to paragraph 5 and 6 of the election petition, the petitioner has not failed to comply with the provisions of the said Rule 4 (1) (*b*).

The said Rule 12 provides that security given on behalf of the petitioner shall be to an amount of not less than Rs. 5,000/- and that, if the number of charges in the election petition exceeds three, additional security to an amount of Rs. 2,000/- shall be given in respect of each charge in excess of the first three. The petitioner has given security by the deposit in cash of the sum of Rs. 7,000/-. It is argued on behalf of the respondent that the security given by the petitioner is inadequate as there are more than four charges in the election petition. The submission made on behalf of the respondent is that in each of the paragraphs 3, 4 and 5 of the election petition there is a charge, and that in paragraph 6 of that petition there are no less than four charges, namely, in connection with the election, bribery by the respondent, bribery by his agent, bribery by his agents, or bribery by persons with the knowledge or consent of the respondent.

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The expression " charges " which appears in the said Rule 12 (2) occurred in a similar rule of 1931, and in connection with the latter rule that expression was interpreted by the Supreme Court in the case of *Tillekewardene* v. *Obeysekera*, reported in 33 New Law Reports, page 65, to be " the various forms of misconduct coming under the description of corrupt and illegal practices ". That interpretation was approved and applied to the said Rule 12 (2) by a Bench of three Judges of the Supreme Court in the case of *Perera* v. *Jayewardene*, reported in 49 New Law Reports, page 1.

Paragraphs 3, 4 and 5 of the election petition do not contain allegations of misconduct of the description of corrupt or illegal practices within the meaning of the said Order-in-Council. Those paragraphs do not contain any charges within the meaning of the said Rule 12 (2).

Paragraph 6 of the election petition refers to the offence of bribery. That offence is a corrupt practice under section 58 of the said Order-in-Council. The said paragraph 6, therefore, contains a charge within the meaning of the said Rule 12 (2). But it is contended on behalf of the respondent that the said paragraph 6 contains more than one charge. In my view that contention is not correct as the charge in that paragraph is the offence of bribery. Although there may be several instances or causes of that offence, there is only one charge, namely, bribery, for the purpose of the said Rule 12 (2). This view is supported by the judgment of the Supreme Court in the two aforesaid cases.

For the above-mentioned reasons I hold that the petitioner has not failed to deposit the amount of security required by the said Rule 12.

I dismiss the petition of the respondent praying for the dismissal of the election petition and I order the respondent to pay the petitioner as costs of this inquiry the sum of Rs. 787/- which is agreed upon by the counsel for the petitioner and the counsel for the respondent.

I fix 14th March, 1966, as the date on which the trial of the election petition shall commence in Colombo.

Application for dismissal of election petition refused.

Present : **Sri Skanda Rajah, J.**

WICKREMASINGHE, FOOD & PRICE CONTROL INSPECTOR *vs.* CHANDRADASA*

S.C. No. 294/65—*M.C. Kandy*, 38788.

Argued and decided on : 9th July, 1965.

Criminal Procedure Code, section 171—*Price Control Act—Charge of selling tamarind in excess of maximum controlled price—Failure to mention penal provision in charge sheet though referred to in report to Court under section* 148 (1) (*b*) *of Criminal Procedure Code—No evidence led as to whether tamarind sold was imported tamarind or local tamarind—Acquittal of accused—Is the failure to mention the penal section a fatal irregularity—Burden of proof.*

Where an accused was charged with having sold half a pound of tamarind for a price in excess of the maximum controlled price and after trial he was acquitted on the grounds : (*a*) that the charge sheet omitted to mention the penal section ; and (*b*) that there was no evidence as to whether this was imported tamarind or local tamarind.

Held : (1) That the failure to mention the penal section did not constitute an illegality as the accused was aware that he was being charged under the Price Control Act and the charge sheet contained a reference thereto. (*Vide* section 171 of the Criminal Procedure Code).

(2) That it was not obligatory on the prosecution to prove that the tamarind sold was imported tamarind, because what was price-controlled was not merely imported tamarind, but also local tamarind.

Cases referred to : *Attorney-General* vs. *Baskaran* 62 N.L.R. 64.
Jayawardene vs. *Aluwihare*, LXIV C.L.W. 92
Fernando vs. *Hameed*, 48 N.L.R. 91
Seneviratne vs. *Deen*, 60 N.L.R. 92
Hewasiliyange vs. *Police*, 47 N.L.R. 301

* For Sinhala translation, see Sinhala section, Vol. 10 part 6, p. 21.

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R. Abeysuriya, Crown Counsel, for the complainant-appellant.

A. H. Moomin with *S. Gunasekera*, for the accused-respondent.

SRI SKANDA RAJAH, J.

The accused in this case was charged with having sold 1/2 pound tamarind for -/30 cents, a price in excess of the maximum controlled price of -/26 cents.

The accused appeared on summons. The summons is in the record but it states that the particulars of the offence were written on an annexed sheet, but that annexed sheet does not appear in the record.

In the report made to Court under section 148 (1) (*b*) of the Criminal Procedure Code, the penal provisions are also mentioned. However, in the charge sheet from which the accused was charged, the penal provision is not mentioned. In the case of *Attorney-General* v. *Baskaran*, 62 N.L.R. 64, it was laid down that " the obligation of framing the charge or charges in a summary trial is one that rests on the Magistrate. "

Section 171 of the Criminal Procedure Code reads : " No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or its particulars shall be regarded at any stage in the case material unless the accused was misled by such error or omission ". All that need be said is that the charge had omitted the last portion of the report made to Court under section 148 (1) (*b*) of the Criminal Procedure Code. This, in my view, did not constitute an illegality because the accused was aware under what Act he was being charged, *i.e.*, under the Control of Prices Act, and in the portion that is contained in the charge sheet which appears in the record reference is made to that Act and to section 4 and 3 (2) of the same Act (*vide Jayawardena* v. *Aluwihare*, 64 C.L.W. 92).

Mr. Moomin has cited the case of *Seneviratne* v. *Deen*, 60 N.L.R. 392, which states that the failure to state in a charge the correct Penal Section is something more than an error referred to in section 171 of the Criminal Procedure Code", but as stated in the *Ceylon Law Weekly* case (*supra*), " in deciding whether there has, in fact, been a failure of justice the appeal Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted ". The failure to mention the Penal Section in this case is, in my view, not a fatal irregularity.

The other point on which the Additional Magistrate acquitted the accused at the end of the case for the prosecution is that there was no evidence whether this was imported tamarind or local tamarind. He expresses the view that it was only imported tamarind that was price-controlled. Though the case of *Fernando* v. *Hameed*, 48 N.L.R. 91, was cited to the learned Magistrate, he did not refer to it in his order. Apparently he did not consider it at all. Besides this last mentioned case, the case of *Hewasiliyanage* v. *Police*, 47 N.L.R. 301, is also in point.

There are 4 columns in the Schedule to the *Gazette*. In the first column " Article " is mentioned. In the second column reference is made to the " Importers' Maximum Wholesale price per cwt. gross " ; column three makes reference to " Wholesale Dealers' Maximum wholesale price per cwt. gross " and column 4 refers to " Retail Dealers ' Maximum retail price per pound nett ". The argument on behalf of the defence is that because reference is made to the Importers' Maximum Wholesale price in column 2, the maximum retail price of a pound of tamarind refers to the price of imported tamarind. The two cases just referred to considered this question and held that column 2 does not control column 4 and that it is not merely the imported article but even the local article is price-controlled. Therefore, in this case I would hold, following these decisions, that what was price-controlled was not merely imported tamarind but also local tamarind and hence it was not obligatory on the prosecution to prove that the tamarind sold was imported tamarind.

For these reasons, I would set aside the order of acquittal and send the case back for a fresh trial before another Magistrate on a properly framed charge.

Set aside and sent back.

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Present : **H. N. G. Fernando, S.P.J., and Abeyesundere, J.**

A. M. LAIRIS APPU *vs.* DERWENT PEIRIS & OTHERS

S.C. No. 36 *(F)/'62—D.C. Kurunegala, No.* 403*/L.*
S.C. No. 44 *(Inty.)/'62.*

Argued on : 16th, 17th and 18th June, and 21st, 22nd and 23rd July, 1965.
Decision and reasons on : 25th August, 1965.

Fideicommissum—Clause " si sine liberis decesserit"—Whether Last Will containing such clause created fideicommissum—Indenture between husband and wife for the division of the wife's estate—Dispute with regard to the division after the death of husband and wife—Arbitration and award in respect thereof—Effect of award on terms of Last Will.

The plaintiffs brought this action for a declaration of title to Raglan Estate. Their case was that the Estate formed part of the property of one Adelene Winifred Peiris (hereinafter referred to as the testatrix) who died in December, 1918, leaving a Last Will. By this Last Will she made certain bequests to her daughter, and then bequeathed the residue of her property to her sons in equal shares subject to the following conditions :—

"(*b*) Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children only taking among themselves the share to which their father would have taken or been entitled to if living subject, however, to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one-fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder.

(*c*) If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be *entitled to* and receive one-fourth of the nett income of the property to which her children would be entitled to under this my Will."

The case of the plaintiffs (who were the children of one son of the testatrix, Richard Louis), was that Raglan Estate was covered by this residuary bequest to the sons of the testatrix, who were three in number, and who all survived the testatrix.

However, on 31st May, 1917, the testatrix and her husband entered into an Indenture by which she agreed to bind herself, her heirs, executors and administrators that her properties shall be distributed and settled in the manner mentioned in the Indenture. Paragraph 11 of this Indenture provided that, within three months of the date of the Indenture, or whenever thereafter called upon by her husband, she shall convey by way of gift to her eldest son, Richard Louis, her Moragolla Group of Estates, which (according to the plaintiffs) included Raglan Estate. The agreement contained in the Indenture was never carried out. After the death of the testatrix and her husband, disputes arose among her heirs as to the distribution of her property, and they were referred to arbitration, and the award of the arbitrator was made a rule of Court. The award declared that although the agreement in the Indenture was never carried out, yet it was binding on the heirs of the testatrix. For the purposes of deciding this appeal it was accepted that the three sons who were entitled to equal shares of the residuary estate under the Last Will took instead the properties which the testatrix had agreed to transfer to them by the Indenture. On this basis (with which the defendants did not disagree) Richard Louis took the entirety of Moragolla Group because of the Indenture of 1917 and the award of the arbitrator, and his two brothers took other properties in lieu of shares in the residuary estate. In 1951 Richard Louis had sold Raglan Estate, and that title had devolved on the defendants. The plaintiffs claimed that Richard Louis had no power of alienating the property because the conditions set out above created a *fideicommissum* in their favour, and that on the death of Richard Louis in 1954 title vested in them. The learned trial Judge held that " the Last Will created a *fideicommissum* in favour of the plaintiffs, but the disposition of the property was by the Indenture, " and held in favour of the plaintiffs. The first defendant appealed, and in appeal put forward three alternative arguments.

Firstly, that even if the Last Will created a *fideicommissum*, the property which Richard Louis took by virtue of the Indenture and award was free of the *fideicommissum*, because of the effect of the Indenture was to render the Last Will inoperative, at least, as regards the properties specifically mentioned in the Indenture.

Secondly, that even if the *fideicommissum* attaches, it can affect only a one-third share of Raglan Estate, since that was the only interest in Raglan Estate which was devised to Richard Louis under the Last Will.

Thirdly, that the Last Will did not create a *fideicommissum* in favour of the plaintiffs.

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Held : (1) That the first argument failed because, on the assumption that the Last Will created a *fideicommissum*, then immediately it was admitted to probate its provisions became operative, and created a *fideicommissum* in favour of the children of Richard Louis, born and unborn. The rights of those *fideicommissaries* could not thereafter be prejudiced by any act or compromise on the part of Richard Louis, except a *bona fide* compromise concerning the division or distribution of the estate among the three devisees.

(2) That the second argument failed because the original one-third share of the residue became converted by reason of the award into the Moragolla Group of estates, which included Raglan Estate, subject to the same conditions as were imposed by the Last Will.

(3) That the third argument succeeded, in that the conditions contained in the Last Will did not in the circumstances of this case create a *fideicommissum* in favour of the plaintiffs.

Per H. N. G. Fernando, J.—" It should not be supposed that the judgments in the two recent cases (*de Silva* v. *Rangohamy* and *Rasammah* v. *Govindar Manar*) evince any special readiness of the Courts to uphold the existence of a *fideicommissum* when property is subject to a *si sine liberis* clause. Such a clause is only one circumstance, taken with the others, which may together suffice to establish an intention to make a gift over to the children of a donee who does not die issueless. Any readiness to assume such an intention from the mere existence of the clause would be in conflict with the principle of construction " *Expressio unius est exclusio alterius* ".

Cases referred to : *De Silva* v. *Rangohamy*, (1961) 62 N.L.R. 553
Rasammah v. *Govindar Manar*, (1963) 65 N.L.R. 467.

H. W. Jayawardene, Q.C., with *L. C. Seneviratne*, *Sepala Moonesinghe* and *B. Eliyatamby*, for the first defendant-appellant.

H. V. Perera, Q.C., with *A. C. Gooneratne*, for the plaintiffs-respondents.

H. N. G. Fernando, S.P.J.

The plaintiffs brought this action for a declaration of title to a land called Raglan Estate stated to be of an extent of two hundred and seventy-one acres. Their case was that the Estate formed part of the property of one Adelene Winifred Peiris (who will be referred to as " the Testatrix ") who died in December, 1918, leaving a Last Will bearing No. 4188 dated 3rd June, 1910. By this Last Will she made certain bequests to her daughters, and then bequeathed the residue of all her property to her sons in equal shares subject to certain conditions to which I will later refer. The plaintiff's case was that Raglan Estate was one of the properties covered by this residuary bequest to the sons of the Testatrix, who were three in number and who all survived their mother. However, on 31st May, 1917, she and her husband entered into an Indenture by which she agreed to bind herself, her heirs, executor and administrators that her properties shall be distributed and settled in the manner mentioned in the Indenture. Paragraph 11 of this Indenture provided that, within three months of the date of the Indenture or whenever thereafter called upon by her husband, she shall convey by way of gift to her eldest son, Richard Louis, her Moragolla Group of estates stated to be about one thousand acres, subject again to certain conditions. It was the plaintiffs' case that the Moragolla Group of estates included Raglan Estate. The agreement in this Indenture was apparently not carried out, and the husband who had the right to call for performance of the agreement died a few weeks before his wife.

The plaintiffs in the present action are the children of Richard Louis, who died in December, 1954. They claim that the combined effect of the Last Will and of the Indenture was that the Moragolla Group of estates passed on the death of the testatrix to Richard Louis, and that, by reason of the conditions contained in the residuary bequest in the Last Will, Richard Louis held the Moragolla Group, which included Raglan Estate, under a *fideicommissum* in favour of his children. On this basis the title to Raglan Estate vested in the plaintiffs on the death of their father, Richard Louis in 1954.

In November, 1951, Richard Louis sold Raglan Estate to one U. B. Senanayake. By virtue of certain subsequent transactions of Senanayake the title he acquired from Richard Louis passed on 9th August, 1952, to the person who is now the appellant in this appeal, and who was in possession of the Estate at the time of the institution of this action.

The claim of the plaintiffs that the Last Will and the subsequent Indenture had a combined effect is an unusual one.

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It would appear that after the death of Adelene Winifred Peiris and her husband, disputes arose among the heirs, presumably because of the provisions in the Indenture by which she had agreed to distribute her property in a specified manner. All matters in dispute were apparently referred to arbitration. The award of the arbitrator was subsequently made a rule of Court in the Testamentary proceedings in which the Will was declared proved. This award declared that, although the agreement in the Indenture of 1917 had not been implemented during the life of Adelene Peiris, it was nevertheless binding on her heirs. Although the matter was not clarified in any way at the trial of this action, counsel for the plaintiffs in appeal has argued that certain assumptions may now be made upon the pleadings. One such assumption is to be that the three sons of the Testatrix, who were entitled under the Last Will to the whole residuary estate in equal shares, each took instead properties which their mother agreed by the Indenture to transfer to each of them. There is no evidence whatever of any actual division of property nor of any conveyance by executors. Nevertheless in disposing of this appeal I can accept the correctness of this assumption. In doing so I should point out that in the pleadings, the defendent (*i.e.*, the present appellant) while claiming that Richard Louis was absolute owner of Reglan Estate, did not present as a ground for that claim any basis different from that relied on by the plaintiffs, viz., that Richard Louis took the entirety of Morogolla Estate because of the Indenture of 1917 and the award of the arbitrator and that his two brothers took other properties in lieu of shares in the residuary estate. If as the appellant claimed, Richard Louis became the owner of Raglan Estate then on the evidence in this case he could have become owner of the entirety through some such arrangement as was suggested in the argument of plaintiffs' counsel.

The learned trial Judge held that "the Last Will created a *fideicommissum* in favour of the plaintiffs, but the disposition of the property was by the Indenture". But the position of the appellant has been that the Last Will does not affect the property which is the subject of this action. This position was based upon a finding of the arbitrator in his award P 3 that the Indenture of 1917 "is binding on the heirs" of the testatrix and her husband, and that, "the two testaments do not, therefore, deal with the properties dealt with by the Indenture". (I should state that the second testament here mentioned is the Last Will of Adelene Winifred's husband, which also was a subject of the arbitration, although nothing is known as to its terms). In the result the first contention for the appellant has been that, even if the Last Will of the Testatrix created a *fideicommissum*, the property which Richard Louis took by virtue of the Indenture and award is free of that *fideicommissum*. The effect of the Indenture, it was argued, was to render the earlier Last Will inoperative, at least, in respect of the properties specifically dealt with in the Indenture. An alternative contention (taken for the first time in appeal) was that even if the *fideicommissum* attaches, it can affect only a one-third share of Raglan Estate, for that was the only interest in Raglan Estate which was devised to Richard Louis by and under the conditions of the Last Will.

In my understanding, Counsel for the plaintiffs in appeal furnished what might be an effective answer to these contentions. His position was that so soon as the Last Will was admitted to probate its provisions became immediately operative, and Richard Louis became entitled to a one-third share of the residuary estate subject to the conditions set out in the Will. If those conditions created a *fideicommissum* in favour of Richard Louis's children, then born or unborn, the rights of those *fideicommissaries* could not thereafter be prejudiced by any act or compromise on the part of Richard Louis, except a *bona fide* compromise concerning the division or distribution of the estate among the three devisees. The question whether the Will created a *fideicommissum*, being one which principally affected the rights of the contemplated *fideicommissaries*, could not be resolved to the detriment of those rights in any proceeding or agreement between the three devisees *inter se*. Even therefore, if the arbitrator intended to decide that the conditions of the residuary devise did not apply to the property which Richard Louis actually took, that decision does not bind the *fideicommissaries* on the question whether or not that property was subject to the *fideicommissum*. But in so far as the award can be regarded as a scheme of division of properties in accordance with the Indenture, in substitution for the division of residuary property in three equal shares to Richard Louis and his two brothers, the award was made in furtherance of a *bona fide* agreement for a settlement by arbitration of disputes concerning a equitable mode of distribution. There being no plea in this case that the division was sought or secured in bad faith, the division itself binds the *fideicommissaries* who

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are now plaintiffs. The division also binds Richard Louis and his brothers because it was made a rule of Court, and it also binds Richard Louis's successor in title to Raglan Estate who is the appellant in this case.

In brief, the position taken by counsel for the plaintiffs is that the original one-third share of the residue devised to Richard Louis by the Will became converted by reason of the award into the Morogolla Group of estates, of which Raglan Estate is one, and that his title to Raglan Estate was subject to the same conditions as were imposed by the Will in respect of the one-third share. If then those conditions created a *fideicommissum* in favour of the plaintiffs, title to Raglan Estate passed to them on the death of Richard Louis as claimed in the plaint. I have stated my acceptance for present purposes of this position and have referred to certain other matters in order to record briefly the arguments presented in appeal. But I do not find it necessary to refer to the authorities upon which counsel relied, or to decide whether or not Raglan Estate did devolve on the plaintiffs' father under the Last Will. For even if so, in any event the conditions in the Last Will did not create a *fideicommissum* in favour of the plaintiffs.

The clauses of the Last Will upon which the plaintiffs rely are the following :—

(*a*) " I give devise and bequeath all the residue and remainder of my property and estate movable and immovable unto my sons in equal shares subject to . . . ".

(*b*) " Should any of my sons die unmarried or married but without leaving issue then and in such case I desire and direct that the share of such dying son shall go to and devolve upon his surviving brothers and the children of any deceased brother such children only taking amongst themselves the share to which their father would have taken or been entitled to if living subject, however, to the right of the widow of such son who shall have died leaving no issue to receive during her widowhood one-fourth of the nett income of the property or share to which her husband was or would have been entitled to hereunder ".

(*c*) " If any of my said sons shall die leaving children and also a widow then and in such case I desire and direct that the mother of such children during her widowhood shall be *entitled to* and received one-fourth of the nett income of the property to which her children would be entitled to under this my Will ".

It is useful to set out the events and consequences contemplated in the above clause which has been for convenience lettered (*b*) ; and I will do so in the context of the actual fact that Adelene Winifred's three sons all survived her :—

(1) If of the three sons, A, B and C, A dies unmarried, the share of A will devolve upon B and C.

(2) If A dies married but issueless, leaving a widow, the share of A will again devolve on B and C, but subject to the widow's right to one-fourth of the income of the property or share to which A was entitled.

(3) If B had predeceased A and left children surviving him, then on A's death the share (in this context better described as " the interest ") which would devolve on B if he were to have been then living would devolve instead on his children.

(4) In the event contemplated at (3) above, then on the subsequent death of C unmarried or issueless, the one-third share devised to C by the Will will devolve on B's children.

This analysis of the events contemplated in clause (*b*) is not exhaustive, but it suffices for present purposes. So also, it is not necessary to consider whether the interest which would on A's death devolve on B and C in terms of (1) and (2) above, would or would not continue to be governed by the conditions in clause (*b*).

Passing now to clause (*c*), it provides :—

(5) That if A, B or C dies leaving issue and a widow, then the widow will be entitled to one-fourth of the income of the property to which her children would be entitled under the Will.

Having regard to the provisions in clause (*b*) which entitle the children of a deceased son to certain interests as may devolve on those children upon the death issueless of an uncle (which have been referred to at (3) and (4) above), clause (*c*) has a plain meaning, namely, that such interests

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will be subject to the right of the mother of those children to receive one-fourth of the income therefrom.

The clauses, therefore, expressly provide for two matters : firstly, the imposition of a *fidei commissum* upon the share of each son, conditional upon his death without issue, in which event the *fideicommissaries* will be the surviving brothers, the children of a deceased brother taking by representation in his place ; and secondly, that the widow of a son dying childless will have a right to a part of the income of the property or share which that son had, and that the widow of a son dying with children surviving him will have a similar right to income from any property which may devolve on those children under the Will. So far as these express provisions go, the children of a son who dies leaving issue will not on the death of their father succeed him as *fideicommissary* substitutes.

The argument for the plaintiffs depends on the fact that clause (*b*) is a *si sine liberis decesserit* clause. That argument was rejected in two recent decisions of this Court in *de Silva* v. *Rangohamy*, 62 N.L.R. 553, and *Rasammah* v. *Govindar Manar*, 65 N.L.R. 467. I need not here recapitulate the reasons for that rejection which are stated in my judgment in the former case. But counsel for the plaintiffs has urged that the testatrix in the present Will has indicated her intention to make a gift over to the children of her son, Richard Louis, upon his dying leaving issue. This indication, it is argued, is shown by the fact that, under the clause which I have lettered (*b*), the children of a deceased son B are designated as *fideicommissaries* in the event of the subsequent death without issue of the son A. But it has to be noted that in the case thus contemplated the children of B only take the place of their deceased father. Every *si sine liberis* clause has the effect of nominating the persons who will take in the event of the death without issue of a donee. But the mere fact that the children of one deceased donee are thus nominated as heirs after the death of another donee are thus nominated as heirs after the death of another donee is no indication of an intention to fetter the property in the hands of a donee who, in fact, has issue.

It should not be supposed that the judgments in the two recent cases evince any special readiness of the Courts to uphold the existence of a *fidei commissum* when property is subject to a *si sine liberis* clause. Such a clause is only one circumstance, taken with the others, which may together suffice to establish an intention to make a gift-over to the children of a donee who does not die issueless. Any readiness to assume such an intention from the mere existence of the clause would be in conflict with the principle of construction " *Expressio unius est exclusio alterius* ".

The conclusion I have reached, that the two relevant clauses of the Will do not create a *fidei commissum* in favour of the plaintiffs operative on the death of their father, is confirmed by other considerations.

For instance, it is, at least, doubtful whether if Richard Louis predeceased the testatrix but left children surviving him, those children would by representation have taken their father's one-third share upon the death of the testatrix. If she failed to provide for her grand-children in that event, there is little room to suppose that she intended that the property which Richard Louis actually took under her Will should be subject to a gift-over to those grand-children after their father's death.

Again when invited to infer such a gift-over from the clause lettered (*b*), I think it prudent to compare this clause with the earlier clause in the same Will applicable to the gifts which the Testatrix directed for her daughters. That clause is easily summarised. It contains :—

(1) A prohibition against alienation and a restriction of the enjoyment of the gift to the life-time of each donee.

(2) A condition that after the death of a donee, the property will devolve on her children in equal shares.

(3) A *si sine liberis* clause, in favour of the surviving sisters of the donee and of the children of a deceased sister.

The provision mentioned at (2) quite clearly simply creates a *fideicommissum* in favour of a donee's children operative on the death of the donee. Equally clearly, the third provision provides for a *fideicommissum* operative in the alternative event of a donee dying childless. It is only this third provision of the devise to daughters that corresponds to the clauses providing for the devise to the sons, the only difference being that in the latter case the widow of a deceased son can take certain interests.

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To accept the arguments of the plaintiffs upon the clause lettered (*b*) would be to assume that the notary, who had carefully provided for the object to be secured by the second provision of the earlier clause, thought at a later stage of his work that the same object could have been secured by the third provision alone. Plaintiffs' counsel himself referred to the experience and reputation which the particular notary and enjoyed. The significant difference between the earlier clause and the clause lettered (*b*) makes it apparent that, in the case of the devise to the sons of the testatrix, the notary had no instruction that the devise should be subject to the *fideicommissum* for which the plaintiffs contend.

One matter which arose only at the stage of appeal was whether probate of the Last Will had been duly granted. We permitted the plaintiffs to produce relevant material with regard to this question. The record of the testamentary case is apparently incomplete and parts of it are missing, but there was produced the original of a grant of probate by the District Court of Colombo of the Will dated 3rd June, 1910, of Adelene Winifred Peiris. This grant of probate bears stamps to the value of over Rs. 19,000/- and specifies the value of the total estate. The Will was not attached to this grant, but there is a copy of the Will No. 4188 of 3rd June, 1910, certified on behalf of the Secretary of the District Court of Colombo, to the effect that it is a true copy of the Will filed in Court in an action bearing the same number as does the probate. This and other material sufficed to establish that the probate of the Will now propounded was, in fact, granted.

I hold that even if Raglan Estate or any share the cof devolved on the father of the plaintiffs under the Last Will of the testatrix, the terms of the Will did not create a *fidei commissum* in favour of the plaintiffs operative on the death of their father. The appeal is allowed and the plaintiffs' action is dismissed with costs in both Courts.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

Present : **Abeyesundere, J., and Sri Skanda Rajah, J.***

EDIRISINGE *vs.* GUNASEKERE

S.C. No. 134 (*Inty.*)/1962—*D.C. Matara, No. L*/1621.

Argued and decided on : November, 1963.

Civil Procedure Code, section 85—*Default of appearance of the defendant—Whether defendant can purge his default before entry of decree nisi.*

Summons was served on the defendant returnable on 29th August, 1962, but the defendant was absent on this date The action was thereupon fixed for *ex-parte* trial for 30th October, 1962. Before that date the defendant applied to Court for permission to file proxy and answer stating certain reasons for his absence on 29th August, 1962. After inquiry the trial judge made order refusing the application, taking the view, firstly, that the defendant had not sufficiently excused his default, and secondly, that it was open to him to excuse his default only after entry of *decree nisi.* On appeal—

Held : Affirming the order of the trial judge, that the defendant had not sufficiently excused his default.

Per Curium.—It is open to a defendant to appear and attempt to excuse his default before entry of *decree nisi. K. A. Perera* v. *H. E. Alwis*, 60 N.L.R 260, followed.

S. W. Jayasooriya with *K. Charavanamuttu*, for the defendant-appellant.

W. D. Gunasekera, for the plaintiff-respondent.

ABEYESUNDERE, J.

In this case summons was served on the defendant and he was absent on August 29, 1962, which was the summons returnable date. The trial of the action *ex-parte* was fixed for October 30, 1962. Before the date of the *ex-parte* trial the defendant applied to Court for permission to file proxy and answer stating certain reasons for his sbsence on August 29, 1962. After inquiry the learned District Judge made order on November 9, 1962, refusing the defen-

* For Sinhala translation, see Sinhala section, Vol. 10 part 6, p. 24.

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dant's application and expressing the view that on his own showing the defendant's absence on the summons returnable date did not appear to be due to any unavoidable cause. We agree with that view of the learned District Judge. He also expressed the view in his order that the application of the defendant was premature and that the defendant would be entitled, only after the entry of decree *nisi,* to plead that there were reasonable grounds for his absence on the summons returnable date. We do not agree with the learned District Judge in regard to the latter view. We hold that the defendant was entitled, at any time before the date fixed for the *ex-parte* trial, to satisfy the Court that there were reasonable grounds for his absence. This view of ours is supported by the decision of this Court in the case of *K. A. Perera* v. *H. E. Alwis*, reported in 60 New Law Reports, page 260.

As we agree with the learned District Judge that the defendant's absence, on his own showing, does not appear to be due to any unavoidable cause, we direct that no further opportunity after decree *nisi* is entered be given to the defendant to plead for excuse of his absence. The *ex-parte* trial of this case shall be proceeded with. The appeal is dismissed with costs.

SRI SKANDA RAJAH, J.
I agree

Dismissed.

Present : **Sirimane, J., and Manicavasagar, J.**

LEELARATNE & ANOTHER *vs.* NIKULAS & OTHERS*

S.C. 478/'63—*D.C. Balapitiya,* 1344/*NP.*

Argued and decided on : 6th July, 1965.

Partition Action—Final Decree entered—Can Court look beyond Final Decree to decide dispute relating to a lot allotted under it ?

By Final Decree entered in 1932 in a partition case, a certain lot was allotted to *P.* and three other defendants. Subsequently a dispute arose with regard to the 1/4th share of *P.* between the appellants and the 5th defendant—the latter contending that the 1/4th share allotted to *P.* should have been allotted to him. The learned District Judge looked beyond the Final Decree and after examining the Interlocutory decree came to the conclusion that the 1/4th-share should have been allotted to the 5th defendant-respondent.

Held : That the learned District Judge erred in looking beyond the Final Decree as a Final Decree is not merely declaratory of the existing rights of parties *inter se* but creates a new title in the parties absolutely against all other persons whomsoever.

Case referred to : *Bernard* v. *Fernando,* 16 N.L.R. 438

E. B. Wikramanayake, Q.C., with *Roland de Zoysa,* for the 17th and 21st defendants-appellants.

M. L. de Silva with *R. Gunatilaka*, for the 5th defendant-respondent.

SIRIMANE, J.

This was a partition action for the land called Lot 6 of Galgodaidama depicted in plan X.

This lot was once a part of a larger land which had been partitioned in D.C. Galle, 24006. By final decree entered in that case in November, 1932, this lot was allotted to the 8th, 10th and 11th defendants in that case and one Pettappu. The dispute is in regard to the 1/4th share of Pettappu which was claimed by the appellants and counter-claimed by the 5th defendant-respondent. It had been contended before the learned District Judge that though the final decree allotted 1/4th-share to Pettappu it should have been allotted to the 5th defendant. The learned Judge looked beyond the final decree, and after examining the interlocutory decree came to the conclusion that a 1/4th share should have been allotted to the 5th defendant-respondent. I am of opinion that he was in error in doing so. Once a final decree is entered in a partition case the allottees or allottee get a *new title* to a lot by virtue of the final decree for partition. Final Decrees are not merely declaratory of the existing rights of

* For Sinhala translation, see Sinhala section, Vol. 10 part 6, p. 22.

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the parties *inter se* ; they create a new title in the parties absolutely against all other persons whomsoever (*vide Bernard* v. *Fernando*, 16 N.L.R., page 438). Pettappu, therefore, had paper title to a 1/4th share of the *corpus* sought to be partitioned. The only question is whether that 1/4th share has been prescribed to by some other party. The learned Judge has held that this share was, in fact, possessed by one Jamis, who is the father of the appellants, for well over 30 years and that Pettappu did not have any possession. The learned Judge should have allotted this 1/4th share to the heirs and successors in title of Jamis.

Learned Counsel who appeared for the defendant-respondent did not seek to support the findings of the District Judge.

I set aside the judgment of the learned Judge insofar as it affects the 1/4th share of Pettappu, and order that that share should be allotted to the widow and children of Jamis.

The appellants are entitled to the costs of the appeal and also to costs of contest in the lower Court which we fix at Rs. 52.50.

MANICAVASAGAR, J.
I agree.

Set aside.

Present : **Sri Skanda Rajah, J.**

INSPECTOR OF POLICE, (CRIMES) GAMPAHA *vs.* GOMIS THISSERA

S.C. Appeal, No. 1053 *of* 1964—*M.C. Gampaha,* 87507/*A*.

(*S.C. Application, No.* 323 *of* 1964—*Application for revision in M.C. Gampaha Case, No.* 87507/*A*).

Argued and decided on : November 17, 1964.

Criminal Procedure Code, section 418—*Need to make use of this provision in cases where dispossession of immovable property is attended with criminal force.*

Held : That where a person has been convicted of an offence attended by criminal force and in consequence of which any person has been dispossessed of immovable property, it is the duty of the Magistrate under section 418 of the Criminal Procedure Code to restore its possession to the complainant.

Frederick W. Obeysekera with *H. Ismail*, for the accused-appellant, in the appeal and for the accused-petitioner, in the application.

U. C. B. Ratnayake, Crown Counsel, for the Attorney-General, in the appeal.

SRI SKANDA RAJAH, J.

This is a particularly bad case where a wastrel son has ousted his aged mother from her house. He was sentenced to a term of imprisonment for one month. I was thinking whether the sentence is adequate. It is with considerable hesitation that I refrain from enhancing the sentence in this case.

The accused has no right of appeal. The appeal is, therefore, rejected. The application for revision is refused.

In a case like this, where a person has been convicted of an offence attended by criminal force, and where any person had been dispossessed of immovable property, in consequence of such force, it was the duty of the Magistrate to make use of section 418 of the Criminal Procedure Code. I regret to note that an experienced Magistrate like the one who has heard this case, has not thought it fit to make use of this provision.

I order that the complainant, Rejo Nona, be restored to possession of the house. The Magistrate should take steps forthwith for the sentence as well as this order to be carried out.

Appeal rejected.
Restoration to possession ordered.

END OF VOLUME LXVIII

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සති පතා ලංකා නීතිය

ඉංග්‍රීසි භාෂාවෙන් පළවන තෝරාගත් සමහර නඩු තීන්දුවල වාර්තා සහ විශේෂ අවස්ථාවල දී
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10 වෙනි කාණ්ඩය

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ජී. පී. ජේ. කුරුකුලසූරිය
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ශූ. ජ. එස්. පෙරේරා එම්.ඒ.(ලන්ඩන්)
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පිටපත් ලබාගත හැක්කේ නො: 50/3, සිරිපා පාර, හැව්ලොක් වටුම—කොළඹ 5,

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පාර්ශවකාරයින්ගේ නාම

ඇන්. එම්. තෙරුන්නාන්සේ එ. කේ. අන්ද්‍රයස් අප්පු සහ තවත් තිදෙනෙක් ... 18

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විජේසිංහ එ. මැණිකා සහ තවත් අය 16

වික්‍රමසිංහ (ආහාර හා මිලපාලන පරීක්ෂක තැන) එ. චන්ද්‍රදාස 21

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අධිකරණ ආඥා පණත (36 වෙනි ඡෙදය)

අධිකරණ පණත — 36 වෙනි ඡෙදය — සුප්‍රීම් උසාවියට ඉදිරිපත්කළ ඇපැලක් හෝ වෙන ඉල්ලීමක් විභාග කළ හැක්කේ කොළඹ දී පමණක් ද?

තීන්දුව: අධිකරණ පණතේ 36 වෙනි ඡෙදය අනුව සුප්‍රීම් උසාවියට ඉදිරිපත් කළ ඇපැලක් හෝ වෙන ඉල්ලීමක් විභාග කිරීම කොළඹ දී පමණක් කළ යුතු යයි සීමා කර නැත.

රැජිනා එ. විමලධම් 3

අධිකරණ ආඥා පණත (1 වන පරිච්ඡෙදය) 20 වන ඡෙදය — පදිංචියට "වීසා" බලපත්‍රයක් තාවකාලික දීමට යයි කරණ ලද ඉල්ලීමක් ප්‍රතික්ෂේප කිරීමට විරුඞව දිස්ත්‍රික් උසාවියේ දැමීමට අදහස් කරණු ලබන නඩුවක් ඇති නිසා ඒ අතර පෙත්සම්කරු ලංකා ද්වීපයෙන් ඉවත් නො කරණ ලෙස තහනම් නියෝගයක් යාඥ කරමින් කරණ ලද නියෝගයක් ඉල්ලීම — මේ සඳහා උසාවිය තෘප්තියට පත් විය යුත්තේ කවර කරුණු උඩ ද යන්න.

සිවිල් නඩු විධාන සංග්‍රහයේ 461 වන ඡෙදයට අනුව නිවේදනයක් දී වග උත්තරකරුවන්ට විරුඞව දිස්ත්‍රික් උසාවියේ දැමීමට අදහස් කරණ ලද නඩුවක් තීන්දුවී නැති අතර තමා ඔවුන් විසින් ලංකා ද්වීපයෙන් බැහැර කිරීම තහනම් කර ඔවුන්ට උපදෙස් දෙන තහනම් නියෝගයක් ලබා ගැනීමට පෙත්සම්කරු අධිකරණ ආඥා පණතේ 20 වන ඡෙදය යටතේ යාඥ කෙලේ ය.

ඔහුගේ පෙත්සමේ පහත සඳහන් පරිදි ප්‍රකාශ ද සැලකර තිබිණි.—

(ඒ) මේ නඩුවේ දෙවන වගඋත්තරකරු වූ ආගමන විගමන පාලක නිලධාරියා සාවද්‍ය ලෙස හා නීති විරෝධී ලෙස ක්‍රියා කරමින් ද තමා පිට පැවරී ඇති බල තල වරදවා ක්‍රියා කරවීමෙන් හෝ ඒවා ඉක්මවා ක්‍රියා කිරීමෙන් හෝ ඔහුට "වීසා" බල පත්‍රයක් දීම ප්‍රතික්ෂේප කිරීම:

(බී) අදහස් කරණ ලද නඩුව දිස්ත්‍රික් උසාවියේ දැමීමට පෙර ඔහු ලංකා ද්වීපයෙන් බැහැර කිරීමෙන් ඔහුට දුස්සාධ්‍ය අලාභ හානි සිදුවීමට හේතු ඇති වීම.

තමා පිට පැවරී ඇති අභිමතය නිර්ව්‍යාජ ලෙස ක්‍රියාවේ යෙදීමෙන් පෙත්සම්කරුට "වීසා" බල පත්‍රයක් දීම ප්‍රතික්ෂේප කළ බැව් දෙවන වග උත්තරකරු තමාගේ දිවුරුම් පෙත්සමින් සැලකර සිටියේ ය.

තීන්දුව: (1) ලක්දිවින් බැහැර කිරීමෙන් තමාට දුස්සාධ්‍ය අලාභහානි සිදු වේ යයි ඔප්පු කිරීමට සහ වගඋත්තරකරුවන්ට විරුඞව අදහස් කරන ලද අයුරින් නඩුවක් දැමීමට තමාට නඩු නිමිත්තක් ලැබී ඇති බව ඔප්පු කිරීමට නො හැකි වී ඇති නිසා පෙත්සම්කරු අයැද සිටි පරිදි තහනම් නියෝගයක් ලැබීමට සුදුසු තත්ත්වයක් නැත.

(2) මෙම ඉල්ලීමේ දී පෙත්සම්කරුට තමා ලක්දිවින් බැහැර කිරීමෙන් දුස්සාධ්‍ය අලාභහානි සිදු විය හැකි බව ගැන පමණක් නොව වගඋත්තරකරුවන්ට විරුඞව තමාට නීතියුක්ත නඩු නිමිත්තක් ඇතිවීම ගැන උසාවිය සෑහීමකට පත් විය යුතු ය.

වෙල්ලසාමි එ. ඇන්. කිව්. ධයස් සහ තවත් කෙනෙක් 6

අපරාධ නඩු විධාන සංග්‍රහය

අපරාධ නඩු විධාන සංග්‍රහය, 328 වන ඡෙදය, ලංකා පාලන සංස්ථා පණතේ 4 වන ඡෙදය, සහ රාජ සන්නාහ ලේඛන, 10 වන ඡෙදය එක්ව කියවූ කල අති වන තත්වය.

වරදට පත් කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීමට ලංකේශ්වරයාණන්හට ඇති බලතල — සමාවක් දීමෙන් ඇති වන ප්‍රතිඵල.

වරදට පත් කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීමට මහේස්ත්‍රාත්තුමාට ඇති බලය.

තමා වරදකරු කරමින් දෙන ලද තීන්දුවට විරුද්ධව ගන්නා ලද ඇපැල නිෂ්ප්‍රභාවූ චෝදිත ඇපැල්කරු ඒ පිළිබඳව ගරු අග්‍රාණ්ඩුකාරතුමාට කරුණු සැලකර සිටියේ ය. එවිට ඔහුට ලැබුණු පිළිතුරෙහි "ඔහු පිට පැවැරුණු දඬුවම ඉවත් කරන ලද"යි ලකිසුරුගෙන් පිළිතුරු ලැබුනි.

මෙයින් තෘප්තියට පත් නුවූ ඔහු ලංකේශ්වරයාණන්හට වැඩිදුරටත් පෙත්සමක් යැවූ පසු ඔහුගේ දඬුවමට පමණක් නොව වරදට පත් කිරීමේ නියෝගය ද ආණ්ඩුකාරතුමා අවලංගු කළ බව කියැවෙන පිළිතුරක් ඔහු ලැබී ය.

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විත්තිකරුගේ නීතිඥයා පෙත්සමක් සමග උසාවියට ඉල්ලීමක් විත්තිකරු වෙනුවෙන් ඉදිරිපත් කරමින් කලින් වරදට පත් කිරීමේ නියෝගය අවලංගු කරණ ලෙස ඉල්ලා සිටියේ ය. මහේස්ත්‍රාත්වරයා මෙහි දී තමා කෙසේ ක්‍රියා කළ යුතු දැයි උපදෙස් ඉල්ලා එය ශ්‍රේෂ්ඨාධිකරණයට එව්වේ ය.

තීන්දුව: (1) මෙම කරුණ ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරමින් මහේස්ත්‍රාත්වරයා කළ ක්‍රියාව නිවැරදි ය. එ මතු ද නොව ඔහු වෙත ඉදිරිපත් කළ ඉල්ලීම ප්‍රතික්ෂේප කරණ ලද නම් එය සම්පූර්ණයෙන් නිවැරදිය. මන්ද? ඔහු විසින් වාර්තා ගත කරණ ලද වරදට පත් කිරීමේ නියෝගයක් ඔහුට ම නිෂ්ප්‍රභා කළ නොහේ.

(2) වරදකරු කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීම විනිශ්චයාත්මකව කළයුතු කාර්‍ය්‍යකි. ලකිසුරුතුමාට එ බඳු විනිශ්චයාත්මක බල තල ක්‍රියාවෙහි යෙදවිය නො හැක. නමුත් වරදකරුවෙකු නිදහස් කර ක්ෂමාව දීමට ලංකේශ්වරයාණන්ට ඇති කිසිම තර්කයකට භාජන නො වන බලයේ ප්‍රතිඵලය වන්නේ වරදකරු කිරීමේ නියෝගය ද නිෂ්ප්‍රභා වීම ය.

රජින එ. විමලධම් 1

අපරාධ නඩු විධාන සංග්‍රහයේ 171 වෙනි ඡේදය — මිල පාලන පණත — සියඹලා පාලන මිලට වැඩි මුදලකට විකුණන ලදැයි චෝදනාවක් — අපරාධ නඩු විධාන සංග්‍රහයේ 148(1) (බි) ඡේදයට අනුව දෙන රපෝර්තුවේ සඳහන්වී ඇතත් චෝදනා පත්‍රයෙහි දණ්ඩන පැනවීම ගැන සඳහන් නොවී තිබීම — විකුණන ලද සියඹලා පිටරටින් ගෙන්වන ලද දේ ද ස්වදේශීය සියඹලා ද යන්න ගැන සාක්ෂි ඉදිරිපත් නො කිරීම — විත්තිකරු නිදහස් වීම — දණ්ඩන පැණවීම සඳහන් නො වීම නඩුව අසාර්ථක වීමට හේතුවක් ද යන වග — කරුණු ඔප්පු කිරීමේ කාර්‍ය්‍යභාරය.

නියමිත වැඩීම පාලන මිලට වඩා වැඩි මුදලකට සියඹලා රාත්තල් බාගයක් විකුණන ලදැයි යන චෝදනාවට නඩු දමන ලද විත්තිකරු —

(ඒ) චෝදනා පත්‍රයෙහි දණ්ඩන පැණවීමේ කොටස් සඳහන් වී නැතැයි ද;

(බී) එම සියඹලා පිට රටින් ගෙන්වන ලද දේ දැයි නැතහොත් මෙ රට සියඹලා දැයි යන්න ගැන සාක්ෂි ඉදිරිපත් වී නැතැයි ද යන කරුණු දෙක උඩ නිදහස් කර හරිනු ලැබී ය.

තීන්දුව: (1) දණ්ඩන පැණවීමේ කොටස චෝදනා පත්‍රයෙහි සඳහන් නොවීම නීති විරෝධ යයි ගිණිය නො හැක. තමා මිල පාලන පණතට අනුව චෝදනා ලබා ඇති බව දන්නා බැවිනුත් ඒ ගැන චෝදනා පත්‍රයෙහි සඳහන් වී ඇති බැවිනුත් මෙය මෙසේ සැලකේ. (අපරාධ නඩු විධාන සංග්‍රහයේ 171 වන ඡේදය බලන්න).

(2) විකුණන ලද සියඹලා පිට රටින් ගෙන්වන ලද දේ යයි ඔප්පු කිරීමට පැමිණිලි පක්ෂය බැඳී නැත. මක්නිසා ද? මිල පාලනය කර ඇත්තේ පිට රටින් ගෙන්වන ලද සියඹලා පමණක් නොව දෙ වර්ගය ම නිසා ය.

වික්‍රමසිංහ, (ආහාර මිළ පාලන පරීක්ෂක තැන) එ. චන්ද්‍රදස 21

උකස් ආඥා පණත

උකස් ඔප්පු පිළිබඳ නඩුවක් — උකස් තැබූ ඉඩමක් නඩු තීන්දු ප්‍රකාශයක් යටතේ විකිණීම — මිල දී ගත්තාට භුක්තිය භාරදීමට යයි පිස්කල් නිලධාරියාට අණදීම — ඊට නොබෝ දිනකට පසු නඩුවක් පවරා ඇති බව කියවෙන (lis pendens) ප්‍රකාශය ලියා පදිංචි කළ පසු උකස්කරුගෙන් හිමිකම ලබාගත් තැනැත්තකු විසින් විකිණීමේ ආඥාව ආපසු ගෙන්වා ගැනීමට කළ ඉල්ලීමක් — ඉල්ලීමට ඉඩ දුන් අධිකරණය ඒ බව පිස්කල් නිලධාරියාට නිවේදනය නො කිරීම — එම තැනැත්තා විසින් ම තමාට භුක්තිය පැවරීමට යයි කළ දෙවන ඉල්ලීමට අධිකරණය ඉඩ දීම — මෙම නියෝගය නිවැරදි ද යන්න.

උකස් පණත (89 වන පරිච්ඡේදය) 5, 16, 34, 35, 36, 54 සහ 55 වන ඡේද.

උකස් ඔප්පුවක් පිළිබඳ නඩු තීන්දු ප්‍රකාශයක් ක්‍රියාත්මක කිරීමෙහි ලා විකුණනලද ඉඩමක් මිලට ගත් ඇපැල්කරුට අධිකරණ නියෝගයකට අනුව පිස්කල් නිලධාරිතැන විසින් භුක්තිය

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සන්තක කරණ ලදී. නමුත් වගඋත්තරකරු විසින් උකස්කාර-විත්තිකරු නඩු තීන්දු ප්‍රකාශයට පසු ව ඉඩමේ හිමිකම තමාට පවරණ ලද යි කියමින් කළ ඉල්ලීමක් අනුව නොබෝ දිනකින් එම ආඥාව ආපසු ගෙන්වා ගැනීමට නියෝගයක් ලබා ගන්නා ලදී. තීන්දු ප්‍රකාශය ක්‍රියාත්මක කිරීම නවත්වන ලද මෙම නියෝගය යථා කාලයේ පිස්කල් නිලධාරිතැනට නො දන්වන ලද යි වග උත්තරකාරිය භුක්තිය තමාට පවරණ ලෙස අධිකරණයෙන් යළිත් ඉල්ලීමක් කළා ය. මෙම ඉල්ලීමට උසාවිය ඉඩ දුන්නේ ය. මෙම නියෝගයට විරුඬ ව ඉදිරිපත් කරණ ලද ඇපෑලේ දී පහත සඳහන් පරිදි තීන්දු විය:—

තීන්දුව: (1) මෙම උකස් නඩුවේ පැමිණිලිකරු උකස් පණතේ 34, 35 සහ 36 යන ඡෙදවල ඇතුළත් ව ඇති සම්ප්‍රදයට අනුව ක්‍රියා නොකළ නිසා මිලට ගත් අයට භුක්තිය දීමේ නියෝගය පණතේ 54 වන ඡෙදයට අනුකූල ව කළ යුතු ය.

(2) උකස් නඩුවක් විනිශ්චයට භාජන වී ඇති බැව් ප්‍රකාශ කිරීම (lis pendens) ලියාපදිංචි කළ පසු පණතේ 16 වන ඡෙදයට අනුව වගඋත්තරකාරිය නඩුවේ තීන්දුවට යටත් විය යුතු කෙනෙකු වීමේ හේතුවෙන් ඊට පසු ඉඩමේ අයිතිය උකස්කරුගෙන් ලත් ඇට මිල දී ගත් අයට විරුඬ ව එය භුක්ති විඳිමට බලය නැත.

(3) එම නිසා වගඋත්තර කාරියට ඉඩමේ භුක්තිය සන්තක කිරීමට යයි පිස්කල් නිලධාරි තැනට දෙන ලද නියෝගය ඉවත් කර දැමිය යුතු ය.

බබ්නෝනා රත්නවීර එ. ලියන පටබැඳිගේ
සහ තවත් අය 9

දණ්ඩ නීති සංග්‍රහය

දණ්ඩ නීති සංග්‍රහය, 419 වෙනි වගන්තිය — ගිනි තියා අනර්ථ කළාය යන චෝදනාව — මනුෂ්‍ය වාසයට ගෙයක්.

තීන්දුව: උදේ ඉදිකරන ලද පැල්පතක් දහවල් 2.00 ට පමණ ගිනිබත් කර ඇත. දණ්ඩ නීති සංග්‍රහයේ 419 වෙනි ඡෙදයේ තේරුම් කරන ආකාරයෙන් එකී පැල්පත සාමාන්‍ය පාවිච්චිය සඳහාවූ මනුෂ්‍ය වාසයට ගත් වාසස්ථානයක් ලෙස ගණන් ගත නොහැක.

ජී. ඇල්. පේද්‍රිස් (නොහොත්) ඩේවිඩ් එ.
තෙන්නකෝන් (පී. සී. 2311) 8

බෙදුම් පණත

බෙදුම් නඩුවක් — අවසාන තීන්දු ප්‍රකාශය — එසේ ප්‍රකාශ තීන්දුවකින් බෙද වෙන් කළ ඉඩම් කැබැල්ලක හිමිකම තීරණය කිරීමට එම අවසාන තීන්දු ප්‍රකාශයෙන් පිටස්තර කරුණු උසාවියක් පරීක්ෂා කළ යුතු ද?

බෙදුම් නඩුවක 1932 වෙනි වර්ෂයේ දී තීරණය කරණ ලද අවසාන තීන්දුවකින් 'පී' යන අයට සහ ඔහුගෙන් පැවත එන තව තුන් දෙනෙකුට ඉඩම් කැබෙල්ලක් හිමිවිය. ඉන් පසු මෙම නඩුවේ ඇපැල් කරුවන් සහ 5 වෙනි වගඋත්තර විත්තිකරු අතර එකී 'පී' නැමැත්තාගේ 1/4 කොටසට ආරවුලක් ඇතිවුනි. 5 වෙනි වගඋත්තරකරු කියා සිටියේ එම 1/4 කොටස ඔහුට එම තීන්දුවෙන් හිමිකළ යුතුව තිබුන බවයි. උගත් දිස්ත්‍රික් නඩුකාර තුමා අවසාන තීරණයෙනුත් ඔබ්බට බලා අන්තර ප්‍රකාශයක් ද පරීක්ෂා කොට පස් වැනි වග උත්තරකරුට එම කොටස දිය යුතු බව නිගමනය කළ හෙයින් එම තීන්දුව ඇපැල් උසාවියට ඉදිරිපත් වුයේ ය.

තීන්දුව: උගත් දිස්ත්‍රික් විනිශ්චයකාර තුමා අවසාන තීන්දුව පමණක් නොබලා ඉන් ඔබ්බට බැලීමෙන් වරදක් කර තිබේ. අවසාන තීන්දු ප්‍රකාශයක් වාර්තා ගතවූවිට බෙද වෙන් කළ එක එක ඉඩම් කොටසකට අළුත් හිමි කමක් ඇති ඒ හිමිකම නඩුවේ පාර්ශ්වකරුවන් අතර පමණක් නොව අනික් හැම කෙනෙකුට ම විරුඬව තීන්දු ප්‍රකාශයේ සඳහන් වන අය සතුවේ.

ලීලාරත්න සහ තවත් කෙනෙක් එ. නිකුලස්
සහ තවත් අය 22

බෙදුම් නඩු පණත (69 වෙනි අධිකාරය), 53 (1) (බී) ඡෙදය — උසාවියෙන් නිකුත් කළ බලය පිට ඉඩමක් බෙද වෙනස් කිරීමට ගිය මිනින්දෝරුවකුට අවහිර කිරීම — උසාවියට අපහාස කිරීමේ චෝදනාව — අවහිර කළ අවස්ථාවේ ඉඩමේ නො සිටි කෙනෙක් අවහිර කළ අය ඊට පෙළඹුවා යයි දඬුවම් දිය යුතු ද?

තීන්දුව: බෙදුම් නඩු පණත උසාවියෙන් බලය ලත් මිනින්දෝරුවෙක් ඉඩමක් බෙද වෙනස් කිරි-

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මට පැමිණි අවස්ථාවේ ඔහුට අවහිර කළ නිසා බෙදුම් පණතේ 53(1)(බී) ඡේදය යටතේ උසාවියට අපහාස කළේ යයි යන චෝදනාවට ඇත්තෙන් ම අවහිර කළ අය පෙළඹුවා යයි කියා ඉඩමේ ඒ අවස්ථාවේ නො සිටි අන් කෙනෙකු වරදකරුවකු නොවේ.

පෙරේරා සහ තවත් කෙනෙක් එ. දයාවතී ... 5

බෙදුම් නඩු ආඥා පණත (1938 ලංකා නීති ප්‍රඥප්ති සංග්‍රහයේ 56 වන අධිකාරය), 5 වන ඡේදය — ඉඩමක් බෙදීම සඳහා මිනින්දෝරුවෙකුට කොමිසමක් නිකුත් කිරීම — 5 වැනි ඡේදයේ අතුරු විධාන යටතේ දින 30 ක් කල් දීමට නියම්වීම—එම විධානය අනුගමනය කිරීම අවශ්‍යම ද — එය අනුගමනය නො කිරීමේ ප්‍රතිඵලය.

එම් නඩුවේ බෙදුම් තීන්දුව ප්‍රකාශයට පත් කිරීමෙන් පසුව බෙදුම් සැලැස්මක් සකස් කරන ලෙස බෙදුම් නඩු ආඥා පණතේ 5 වැනි ඡේදය යටතේ මිනින්දෝරුවකුට කොමිසමක් නිකුත් කරන ලදී. සැලැස්ම සකස් කළ යුතු කොමසාරිස්වරයා ඉඩම බෙදීමට ප්‍රථමයෙන් දින 30 ක් කල් දිය යුතු බව 5 වැනි ඡේදයේ අතුරු විධානය යටතේ නියම වී ඇත. එසේ කල් දී නැති බව නඩුවේ සටහන් වලින් හොඳින් ම පැහැදිලි ය. කොමසාරිස්වරයා විසින් සකස් කරන ලද සැලැස්ම විභාග කිරීමෙන් පසු දිස්ත්‍රික් නඩුකාරතුමා කළ නියෝගයට විරුද්ධව මේ ඇපෑල ඉදිරිපත් කර තිබේ.

කල් දීම පිළිබඳ විධානය අනුගමනය කිරීම අත්‍යාවශ්‍ය බව ඇපැල්කරුවන් වෙනුවෙන් ප්‍රකාශ කරන ලදී. මේ ප්‍රශ්නය උගත් දිස්ත්‍රික් නඩුකාර තුමා ඉදිරියේ පැවැත්වුන විභාගයේ දී මතු නො කරන ලද අතර එය පළමු වරට මතු කරන ලද්දේ ඇපැලේ දී ය.

තීන්දුව: (1) බෙදුම් නඩු ආඥා පණතේ 5 වැනි ඡේදයේ අතුරු විධානයේ විධාන අනුගමනය නො කිරීම නිසා කොමසාරිස් වරයා ස්වකීය කොමිසම නීති ප්‍රකාර ක්‍රියාවට පත් කර නැත.

(2) එම නිසා ඇපැලට හේතු වූ නියෝගය ඉවත හෙලා 5 වැනි ඡේදය යටතේ අළුත් කොමිසමක් නිකුත් කළ යුතු ය.

ඩී. පී. දහනායක සහ තව අයෙකු එ. ඩී. ඩබ්ලිව. අලගකෝන් සහ තවත් අය ... 15

මුද්දර ආඥා පණත

මුද්දර ආඥා පණත — II වෙනි කොටසේ නියමය පරිදි මුද්දර ගසා සහතික කළ නීති වාර්තා පිටපත් සුප්‍රීම් උසාවියට ඉදිරිපත් කරන විට ඒ සහතික පිටපත් වලට නැවතත් මුද්දර ගැසිය යුතු ද? — එම ආඥා පණතේ I වෙනි කොටය එහි II වෙනි කොටසේ නියෝගයට බල පායි ද? — සිවිල් නඩු විධාන සංග්‍රහය, 205 වෙනි ඡේදය.

තීන්දුව: (1) මුද්දර ආඥා පණතේ I වෙනි කොටසේ අංක 24 වෙනි නියෝගය එම ආඥා පණතේ II වෙනි කොටසේ විශේෂයෙන් සඳහන් ව ඇති උසාවි වල නඩු වාර්තා සහතික පිටපත් වලට සම්බන්ධයක් නැති බව පැහැදිලි ය.

(2) හරියාකාර මුද්දර ගැසූ ලියවිල්ලක් උසාවියකට ඉදිරිපත් කරන විටක දී ඊට නැවත වරක් මුද්දර ගාස්තු ගෙවිය යුතු නොවේ.

ධම්මින්ද නායක ස්ථවිර එ. ඇෆ්. ජේ. ඩයස් ... 17

විහාර දේවාල ගම් පණත

විහාර දේවාලගම් පණත — 20, 26 වන ඡේද — ආඥා පණතකට (ඇස්කිසියකට) අනුව පිස්කල් නිලධාරියා විසින් සාංඝික දේපළ අල්වා ගැනීම — — මෙය සාංඝික දේපොළ යයි විහාරාධිපතීන් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා ඉල්ලා සිටීම — ඉල්ලීම ප්‍රතික්ෂේප කිරීම — සිවිල් නඩු විධානයේ 247 ඡේදයට අනුව නඩුවක් — එය කියාගෙන යාමට ඔහුට තත්ත්වයක් තිබේ ද යන්න.

විහාරාධිපතීන් වහන්සේ නමකට විරුද්ධව නිකුත් වූ ප්‍රකාශයකට එකඟ ව පිස්කල් නිලධාරියා විසින් අල්වා ගත් ඉඩමකට පැමිණිලිකරු පහත සඳහන් පරිදි අයිතිවාසිකම් කියමින් එය ඉල්වා සිටියේ ය.

(ඒ) උන්වහන්සේ විහාරාධිපතීන් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වීම;

(බී) ඒ ඉඩම සාංඝික දේපළ බැවින් එය ඇල්ලීමට නො හැකිවීම.

තමාගේ ඉල්ලීම ප්‍රතික්ෂේප වූ පසු පැමිණිලි කරුවා සිවිල් නඩු විධාන සංග්‍රහයේ 247 වන ඡේදය යටතේ මෙම නඩුව දැමීය. මෙම ඉඩම

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පැමිණිලිකරු වෙත පැවරී නැතැයි ද, එම නිසා ඔහුට මෙම නඩුව කියාගෙන යාමට තත්ත්වයක් නැතැයි ද යන කරුණු උඩ මෙම නඩුව නිෂ්ප්‍රභා විය.

තීන්දුව — (1) පැමිණිලිකරු විහාරාධිපතීන් වහන්සේ නො වන නිසා විහාර දේවාල ගම් ආඥා පණතේ 20 වන ඡේදයෙන් විහාරායතන වෙත පැවරෙන සන්තක සියළුම දේපළ විහාරාධිපතීන් වහන්සේ බැවින් මෙම නඩුව දැමීමට පැමිණිලිකරුට තත්වයක් නැත.

(2) විහාරාධිපතිට විරුද්ධව තමාගේ නඩත්තු සඳහා විහාරසන්තක පොදු වස්තුවෙන් කොටසක් ඉල්වීමට පැමිණිලිකරුට ඇති අයිතිය පුද්ගලික අයිතියක් මිස එය ඉඩමක් පිළිබඳ අයිතියක් නොවේ.

(3) විහාර දේවාල ගම් පණතේ 26 වන ඡේද-යෙන් ඇස්කිසියක් නිකුත් කොට විහාර සන්තක ඉඩම් ඇල්වීමට තහනමක් නැත්තේ ය.

ඇන්. එච්. තෙරුන්නාන්සේ එ. කේ. අන්ද්‍රායස් අප්පු සහ තවත් තිදෙනෙක් 18

සිවිල් නඩු සංවිධානය

සිවිල් නඩු සංවිධානය — නඩු විභාගය දිනයේ පැමිණිලිකරු පෙනී නො සිටීම — ඔහුගේ පෙරකදෝරුතැන තමාට දුන් පෙරකලාසිය අවලංගු කිරීමට යාච්ඤා කර තිබෙන බව දන්වීම — ඔහු පැමිණිලිකරු වෙනුවෙන් පෙනී නො සිටින බව හා නඩුව පිළිබඳ උපදෙස් නො ලත් බව උසාවියට නො දන්වීම — පැමිණිලිකරු උසාවියේ පෙනී නො සිටියා යැයි කියා ''නයිසයි'' තීන්දු ප්‍රකාශයක් කිරීම — එම ප්‍රකාශය නීත්‍යානුකූල ද?

තීන්දුව: නඩු දිනයක දී උසාවිය ඉදිරියේ පෙනී නො සිටි පැමිණිලිකරුවෙකුගේ පෙරකදෝරුතැන විසින් තමාට පැමිණිලිකරුගෙන් ලැබුන පෙරකලාසිය අවලංගු කිරීමට යාච්ඤා කර තිබෙන බව පමණක් උසාවියට දන්වීමෙන් එම පැමිණිලිකරු වෙනුවෙන් කිසිවෙක් පෙනී නො සිටියා ය යන නිගමනය පිට ඔහුට විරුද්ධ ''නයිසයි'' තීන්දු ප්‍රකාශයක් කළ නොහැක — එසේ කළ හැක්කේ ඒ පෙරකදෝරුතැන විසින් තම පැමිණිලිකරු වෙනුවෙන් නො පෙනෙන බව හෝ පැමිණිලිකරුගෙන් නඩුව විභාගය සඳහා කිසි උපදේශයක් නො ලැබුන බව දන්වීමෙනි.

විජේසිංහ එ. මැණිකා සහ තවත් අය ... 16

සිවිල් නඩු විධාන සංග්‍රහයේ 88 වන ඡේදය— විත්තිකරු නියමිත දින උසාවියට නොපැමිණීම— විත්තිකරුට තමාගේ නො පැමිණීම ගැන ''නයිසයි'' නියෝගයට කලින් කරුණු කිය හැකිද යන්න.

විත්තිකරුට 29.8.62 දරණ දින පැමිණීම සඳහා සිතාසි භාර දෙන ලදුව ඔහු එදින උසාවියට නො පැමිණියේ ය. නඩුව මේ නිසා 30.10.62 දරණ දින ඒකපාක්ෂිකව විභාග කිරීමට නියම විය. එම දිනට කලින් උසාවියට පැමිණි විත්තිකරු තමාගේ පෙරකලාසිය සමග 29.8.62 වන දින නො පැමිණීමට හේතු දැක්වීමට අවසර දෙන ලෙස උසාවියෙන් ඉල්ලා සිටියේය. මේ සඳහා විභාගයක් පැවැත් වූ විනිශ්චයකාරතුමා, පළමුව විත්තිකරු තමාගේ නොපැමිණීම ගැන සමාවක් ලැබීමට සෑහෙන කරුණු කියා නැතැයි යන මතය ද, දෙවනුව විත්තිකරුට තමා නො පැමිණීම ගැන නිදහසට කරුණු කිය හැක්කේ ''නයිසයි'' නියෝගය නිකුත්වූවාට පසුව යයි යන මතය ද පළකරමින් විත්තිකරුගේ ඉල්ලීම ප්‍රතික්ෂේප කළේය.

තීන්දුව: (දිස්ත්‍රික් විනිශ්චයකාරතුමාගේ මතය සනාථ කරමින්) විත්තිකරු තමාගේ නො පැමිණීම ගැන තම නිදහසට සෑහෙන පමණ කරුණු කියා නැත.

අධිකරණ ප්‍රකාශය: 'නයිසයි' නියෝගය දීමට කලින් පැමිණ තමා නියමිත දින නො පැමිණීම පිළිබඳව කරුණු කීමට විත්තිකරුවකුට නිදහස තිබේ. (කේ. ඒ. පෙරේරා එ. එච්. ඊ. අල්විස් 60 න.නී.වා. 260, අනුගමනය කරණ ලදි.)

එදිරිසිංහ එ. ගුණසේකර 24

සුරාබදු ආඥා පණත

සුරාබදු ආඥා පණත — ආණ්ඩුවේ ඒජන්ත තැනගෙන් අවසර පත්‍රයක් නො ලබා අරක්කු විකිණීම නිසා 18 වන ඡේදය යටතේ චෝදනාවක් — චෝදිතයා වෙත අවසර පත්‍රයක් නැතැයි කියන කිසිම සාක්ෂියක් පැමිණිල්ලෙන් ඉදිරිපත් නොවූ

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හේතුවෙන් පැමිණිල්ලේ සාක්ෂි නිමාවෙන් පසු චෝදිතයාට විරුද්ධව චෝදනාව නිෂ්ප්‍රභා කිරීම — මෙම සාක්ෂි ඉදිරිපත් කිරීමේ කාර්‍යභාරය ඇත්තේ පැමිණිලි පක්ෂය පිට ද?

තීන්දුව: ආණ්ඩුවේ ඒජන්ත ගෙන් අවසර පත්‍රයක් නො ලබා අරක්කු විකිණීම පිළිබඳව සුරාබද්ද ආඥා පණතේ 18 වන ඡේදය යටතේ චෝදනාවක් ඉදිරිපත් කළ විටක එ බඳු බලපත්‍රයක් තමා වෙත තිබුනේ යයි ඔප්පු කිරීමේ කාර්‍යභාරය ඇත්තේ චෝදිතයා පිට ම ය.

සොලිසිටර් ජනරාල් එ. ඇම්. පී. ධම්සේන ... 13

සුරාබද්ද පණත, 37 වෙනි ඡේදය — විත්තිකරුගේ වාසස්ථානයට පොලිසියේ නිලධාරීන් සෝදිසි වරෙන්තුවක් ලබා නො ගෙන ඇතුල් වීම — ඔවුන් සුරාබද්ද පණතේ 37 වෙනි වගන්තිය යටතේ එසේ කළ බව හැඟවීම — විභාගයේ දී එය ඔප්පු නොකිරීම — විත්තිකරු පොලිස් නිලධාරීන්ට ඔවුන්ගේ රාජකාර්‍යය ඉෂ්ට කිරීමට බාධා කළා යයි චෝදනා ලැබ වරදකරු වීම — එම තීන්දුව නීත්‍යානුකූල ද?

නීතිවිරෝධී ලෙස නිෂ්පාදනය කළ සුරා විත්තිකරු ළඟ තිබෙන බවට ලැබුන ඔත්තුවක් පිට පොලිස් නිලධාරීන් විසින් විත්තිකරුගේ නිවසට ඇතුල් වී තිබේ. එසේ ඇතුල් වීමට බලය අඩංගු සෝදිසි වරෙන්තුවක් ලබාගෙන නැත. එ වැනි අවස්ථාවක සුරාබද්ද පණතේ 37 වෙනි ඡේදය අනුව සෝදිසි වරෙන්තුවක් ලබා ගැනීමට යාමේ ප්‍රමාදය නිසා වරදකරුට බේරී යාමට ඉඩ ප්‍රස්ථා ලැබේ ය යන බැව් හැඟී ගියොත් ඒ බව සටහන්කළාට පසු එ වැනි ඇතුල්වීමකට බලය දී තිබෙන නිසා එසේ සටහන් කර ක්‍රියා කර තිබෙන බව පෙනේ. නමුත් එසේ සටහනක් කළ බව නඩු විභාගයේ දී පැමිණිල්ලෙන් ඔප්පු කර නැත.

තීන්දුව: සුරාබද්ද පණතේ 37 වෙනි ඡේදය අනුව එ වැනි අවස්ථාවක සටහනක් කිරීම නියතයෙන්ම උවමනා ය. එසේ කළ බව ඔප්පු කර නැති නිසා විත්තිකරුගේ නිවසට පොලිස් නිලධාරීන් ඇතුල් වීම නීති විරෝධී ක්‍රියාවක් බැවින් ඔවුන්ට තම රාජකාර්‍යය ඉෂ්ට කිරීමට බාධා කළා යයි විත්තිකරුට විරුද්ධව ඉදිරිපත් කළ චෝදනාවට ඔහු වරදකාරයෙකැයි නිගමනය කළ නො හැක.

සිරිසේන සහ තවත් අය එ. ඩබ්ලිව්. පී. වරකගොඩ, වැල්ලවත්තේ පොලිස් පරීක්ෂක ... 11

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ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමාණන් ඉදිරිපිටදී

රජින එ. විමලධම්*

කෑගල්ලේ මහේස්ත්‍රාත් උසාවියේ 38289. සංශෝධන ඉල්ලීම නො. 10/1965—ඒ. පි. එන්/සාමාන්‍ය

තීන්දු කළේ : 1965 පෙබරවාරි 12.

අපරාධ නඩු විධාන සංග්‍රහය, 328 වන ඡේදය, ලංකා පාලන සංඝ්‍යා පණතේ 4 වන ඡේදය, සහ රාජ සන්නස් ලේඛන, 10 වන ඡේදය එක්ව කියවූ කල ඇති වන තත්ත්වය.

වරදට පත් කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීමට ලංකේශ්වරයාණන්හට ඇති බලතල—සමාවක් දීමෙන් ඇති වන ප්‍රතිඵල.

වරදට පත් කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීමට මහේස්ත්‍රාත්තුමාට ඇති බලය.

තමා වරදකරු කරමින් දෙන ලද තීන්දුවට විරුද්ධව ගන්නා ලද ඇපැල නිෂ්ප්‍රභාවූ චෝදිත ඇපැල්කරු ඒ පිළිබඳව ගරු අග්‍රාණ්ඩුකාරතුමාට කරුණු සැලකර සිටියේ ය. එවිට ඔහුට ලැබුනු පිළිතුරෙහි "ඔහු පිට පැවරුණු දඩුවම ඉවත් කරන ලද" යි ලකිසුරුගෙන් පිළිතුරු ලැබුනි.

මෙයින් තෘප්තියට පත් නුවූ ඔහු ලංකේශ්වරයාණන්හට වැඩිදුරටත් පෙත්සමක් යැවූ පසු ඔහුගේ දඩුවමට පමණක් නොව වරදට පත් කිරීමේ නියෝගය ද ආණ්ඩුකාරතුමා අවලංගු කළ බව කියැවෙන පිළිතුරක් ඔහු ලැබී ය.

විත්තිකරුගේ නීතිඥයා පෙත්සමක් සමග උසාවියට ඉල්ලීමක් විත්තිකරු වෙනුවෙන් ඉදිරිපත් කරමින් කලින් වරදට පත් කිරීමේ නියෝගය අවලංගු කරණ ලෙස ඉල්ලා සිටියේ ය. මහේස්ත්‍රාත්වරයා මෙහි දී තමා කෙසේ ක්‍රියා කළ යුතු දැයි උපදෙස් ඉල්ලා එය ශ්‍රේෂ්ඨාධිකරණයට එව් ය.

තීන්දුව:— (1) මෙම කරුණ ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරමින් මහේස්ත්‍රාත්වරයා කළ ක්‍රියාව නිවැරදි ය. එ මතු ද නොව ඔහු වෙත ඉදිරිපත් කළ ඉල්ලීම ප්‍රතික්ෂේප කරණ ලද නම් එය සම්පූර්ණයෙන් නිවැරදිය මන්ද? ඔහු විසින් වාර්තාගත කරණ ලද වරදට පත් කිරීමේ නියෝගයක් ඔහුට ම නිෂ්ප්‍රභා කළ නොහේ.

(2) වරදකරු කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීම විනිශ්චයාත්මකව කළයුතු කාර්‍ය්‍යයකි. ලකිසුරුතුමාට එ බඳු විනිශ්චයාත්මක බල තල ක්‍රියාවෙහි යෙදවිය නො හැක. නමුත් වරදකරුවෙකු නිදහස් කර ක්ෂමාව දීමට ලංකේශ්වරයාණන්ට ඇති කිසිම තර්කයකට භාජන නො වන බලයේ ප්‍රතිඵලය වන්නේ වරදකරු කිරීමේ නියෝගය ද නිෂ්ප්‍රභා වීම ය.

ඇස්. ඇස්. විමලධම්. පෙත්සම්කාර විත්තිකරුම පෙනී සිටි.
රජයේ අධිනීතිඥ රංජිත් ධීරරත්න, ඇටර්නි-ජනරාල්තුමා වෙනුවෙන් අධිකරණ සහායක වශයෙන්.

ගරු ස්කන්ධ රාජා විනිශ්චයකාරතුමා

මෙම නඩුව මෙම අධිකරණයට පිළිපන් ආකාරය මෙසේ ය: ආණ්ඩුවේ පාඨශාලාවක ආචාර්‍ය්‍යවරයෙකු වන මෙම නඩුවේ විත්තිකරු සචේතනිකව කඩුවකින් කැපීමෙන් තුවාල කිරීමකට වැරදිකරු වී ඔහුට රුපියල් 100/- ක දඩයක් පමණක් නියම විය. ඉක්බිති ඔහු මෙම උසාවියට අභියාචනයක් (ඇපැල් පෙත්සමක්) ඉදිරිපත් කළ නමුදු එය අපේ ඉතාම ප්‍රසිද්ධ රාජනීතිඥ-වරයෙකු විසින් විවාද කළ ද 1963 ජුනි මස 26 වෙනි දින නිෂ්ප්‍රභා කරන ලදී.

ඉන් පසු චෝදිතයා ගරු ශ්‍රීමත් ලංකා අග්‍රාණ්ඩුකාර-තුමාට කරුණු සැළ කර සිටියේ ය. මෙයට පිළිතුරු වශයෙන් වර්ෂ 1963 නොවැම්බර මස 7 වෙනි දින ඔහුට ලියමනක් ලැබිණි. එහි සඳහන් ව තිබුණේ, "ඔහු පිට පැවරුණු දඩුවම ඉවත් කර තිබේ" යනු යි. මෙයින් ද තෘප්තියට පත් නොවූ චෝදිතයා නැවත වරක් ලංකේශ්-වරයාණන්ට 1964 ජුලි 20 වෙනි දින දරණ පෙත්සම යැවී ය. එයට පිළිතුරු වශයෙන් වර්ෂ 1964 අගෝස්තු 5 දින ලත් ලිපියෙහි කලින් චෝදිතයාට එවුණු 1963 නොවැම්බර 7 වෙනි දින දරණ ලිපිය ගැන ද සඳහන් වී තිබුණි. මෙම උසාවියෙහි සිංහල භාෂා පරිවර්තක

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 67 වෙනි කා., 14 වෙනි පිට බලනු.

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නිලධාරියා විසින් ද එසේ ම සිංහල බස ගැන ප්‍රවීණත්වයක් ඇති රජයේ අධිනීතිඥවරයා විසින් ද එම 1964 අගෝස්තු 5 වෙනි දින දරණ ලිපිය නිවැරදි ලෙස එහි අතින් පිටේ පරිවර්තනය කොට ඇති බව මෙම උසාවියට දන්වූහ. එම පරිවර්තනය පහත පෙනෙන පරිදි වේ: ''ඉහත සඳහන් නඩුවේ දී තමා පිට පැවැරුණු දඬුවම පමණක් නොව තමා වරදට පත් කිරීමේ නියෝගය ද ශ්‍රීමත් ලංකේශ්වරයාණන්ගේ අණ පරිදි නිෂ්ප්‍රභා කළ බවත් ඒ බව තමාට 1963 නොවැම්බර 7 වෙනි දින සහ අංක N/J—R. 148/63 දරණ ලිපියෙන් ශ්‍රීමතාණන්ගේ අණ පරිදි දන්වා ඇති බවත් වරකාපොල මෙනේරිපිටියේ ඊ. ඇස්. විමලධර්ම මහතාට මෙයින් දන්වන්ට යෙදුණා ඇත''. මෙසේ වරදට පත් කිරීමේ නියෝගයක් ශ්‍රීමත් ලංකාණ්ඩුකාරතුමාට වෙනස් කළ හැකි ද යන ප්‍රශ්නය මෙහි දී පැන නැගේ. වරදට පත් කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීමෙහි දී විනිශ්චයාත්මක බලතල භාවිතා කිරීමෙහි එම කටයුත්ත රැඳේ. මෙ බඳු විනිශ්චයාත්මක බලයක් අනිවාර්යයෙන් ම පැවරී ඇත්තේ ලංකා පාලන සංස්ථා ආඥා පණත අනුව ශ්‍රේෂ්ඨාධිකරණය වෙත සහ අධිකරණ සේවා කොමිෂම විසින්ම කරන ලද පත්කිරීම් ඇති අනිකුත් අධිකරණයක් වෙත සහ තීරක මණ්ඩල වෙතය. පාලනතන්ත්‍රයේ විධායක අංගය මගින් මෙම විනිශ්චයාත්මක බලය නීත්‍යානුකූලව ක්‍රියාවෙහි යෙද විය නො හැක.

ලංකා පාලන සංස්ථා ආඥා පණතේ (279 වෙනි පරිච්ඡේදය) 4 වන ඡේදය සහ රාජසන්නස් ලේඛන 10 වන ඡේදය (388 වන පරිච්ඡේදය) සමග එකට කියවූ කල අපරාධ නඩුවිධාන සංග්‍රහයෙහි 328 වන ඡේදය චිත්තිකරුවකු නිදහස් කර සමාව දීමට ලංකේශ්වරයාණන්ට බලය ඇති බව මෙම උසාවිය නොදන්නවා නොවේ. එම අයිතිය ගැන කිසිවෙකුට ප්‍රශ්න කළ නො හැක. නිදහස් කර දෙන සමාවෙන් **ලැබෙන ප්‍රතිඵලය** වරදකරු කිරීමේ නියෝගය ද මැකී යාම ය.

ශ්‍රීමත් ෆ්‍රැන්ක් නිව්සම් විසින් ලියන ලද ''Home Office'' (ස්වදේශීය මහා කාර්යාංශය) නැමැති ග්‍රන්ථයෙහි 114 වන පිටෙන් උපුටා කරුණු දැක්වීම මෙහි ලා ප්‍රයෝජනවත් විය හැක: ''නිදහස් කර සමාවක් දීම, දෙන ලද තීන්දුව හෝ දඬුවම පමණක් නොව එහි වරදට පත් කිරීම සහ එසේ පත් කිරීමෙන් ඇති වන සියළු ආදීනව සම්පූර්ණයෙන් මකාහරී. මෙසේ නිදහස් කර සමාව දුන් කාලයේ පටන් එ බඳු සමාවක් ලත් තැනැත්තා විසින් කවදවත් වරදට පත් නො කරන ලද කෙනෙකුගේ තත්ත්වයට හිමිකරුවෙක් වේ.

මෙසේ අපරාධ නඩුවිධාන සංග්‍රහයේ 328 (2) දරණ ඡේදය යටතේ නියෝගයක් දීමට පෙර (දඬුවම අඩු කිරීමට හෝ වැළැක්වීමට) ''ගරු ආණ්ඩුකාරතුමාට අභිමත යැයි වැටහේ නම් එම නඩුවෙහි විනිශ්චයාසනයෙහි උන් විනිසකරු හෝ මහේස්ත්‍රාත්වරයා වෙත මෙම ඉල්ලීමට ඉඩ දීම පිළිබඳ ව ඔහුගේ අදහස් දක්වන ලෙස දන්වා යැවිය යුතු බව පැණවී තිබේ''.

ඉහත සඳහන් කළ ''Home Office'' (ස්වදේශීය මහා කාර්යාංශය) නැමති පොතේ 121 වන පිටුවෙහි මෙසේ ලියැවී තිබේ: කෙනෙකු වරදට පත් කිරීමේ නියෝගයකින් පසුව සහ ඔහුට ඇපැල් පෙත්සමක් ඉදිරිපත් කිරීමට ඇති අයිතිවාසිකම අහෝසි වීමෙන් පසුව ද **යුක්තිය පසිඳීමෙහි යම් කිසි ආක්‍රමණයක් සිදුවී ඇතැයි පෙනී යන අවස්ථාවෝ විරලයහ. ස්වදේශ කටයුතු භාර මහා ලේකම්තුමා මෙ බඳු අවස්ථාවන්හි ස්වදේශ කටයුතු භාර මහා ලේකම්තුමා මෙ ලෙස නිදහස් කර සමාව දෙන අවස්ථාවක හෝ දඬුවම අඩු කරන අවස්ථාවක නිතරම කරන්නේ එම නඩුව විසඳූ මහේස්ත්‍රාත්වරයාගෙන් හෝ ඇපැල් පෙත්සම විභාග කළ විනිසකරුවාගෙන් කරුණු අසා බැලීම ය.**

1964 අගෝස්තු මස 5 වෙනි දින දරණ ඉහත සඳහන් ලිපිය චෝදිතයාගේ නීතිඥ මහතා විසින් ඉදිරිපත් කරමින් පෙත්සමක් සහ මහේස්ත්‍රාත් උසාවියට ඉල්ලීමක් ද ඉදිරිපත් කර තිබේ. එම ඉල්ලීමෙන් කියැවෙන්නේ මෙසේ වරදට පත් කිරීම මහේස්ත්‍රාත්තුමා විසින් නිෂ්ප්‍රභා කරන ලෙස ය. මෙහි දී තමාට මෙ බඳු ඉල්ලීමක් පිළිගෙන ක්‍රියා කිරීමට ආඥා බලයක් ඇද්දැයි සැක සිතුණු මහේස්ත්‍රාත්වරයා තමා මෙහි දී කෙසේ ක්‍රියා කළ යුතු දැයි උපදෙස් ලබා ගැනීම පිණිස ඒ ඉල්ලීම සහිත නඩුව මෙම උසාවියට එවී ය. චෝදිතයාට ඒ බව දන්වා මෙම විභාගය ඇරඹුණේ එයින් පසුව ය.

සැකයකට භාජනය වූ විට මහේස්ත්‍රාත්වරයෙකු විසින් එම ලිපිලේඛන මෙම උසාවියට එවීම නිවැරදිය. නමුත් නීතිඥ මහතාගේ මාර්ගයෙන් චෝදිතයා කරන ලද ඉල්ලීම මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කරන ලද නම් එය ඉතාම නිවැරදි ය. තමා විසින් වාර්තා ගත කළ වරදට පත් කිරීමේ නියෝගයක් නිෂ්ප්‍රභා කිරීමට මහේස්ත්‍රාත්වරයෙකුට බලයක් නැත. නියෝගය දුන් පසු එම නියෝගය පිළිබඳව මහේස්ත්‍රාත්වරයා නිල බලයෙන් තොරවේ. **මහරජාණන් එ. ගෙස්ට** චිත්තිකරු අනභිමුඛයේදී අන්තෝනි: (1964) 3 සමස්ත එංගලන්ත වාර්තා 385. එම නිසා මෙම උසාවියෙන් ස්ථිර කරන ලද වරදට පත් කිරීමක් නිෂ්ප්‍රභා කිරීමට ඔහුට නො

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හැකි බව තේරුම් ගැනීමට පිළිවන. මෙම ඉල්ලීම කරුණු වරදවා අවබෝධ කර ගැනීමෙන් කරන ලද්දකි. එම නිසා එය ප්‍රතික්ෂේප කරනු ලැබේ.

ඇග්නස් නෝනාගේ නඩුවෙහි, 53 න.නී.වා. 106 වන පිට, ශ්‍රීමත් ආණ්ඩුකාරතුමා විසින් දෙන ලද නියෝගයක් අධිකරණ අමාත්‍යවරයාගේ ස්ථාවර ලේකම් තැන විසින් නීත්‍යානුකූල නො වන ලෙස ක්‍රියාවෙහි යෙදවීමට ආයාසයක් ගන්නා ලදි. නමුත් මෙම නඩුවෙහි ශ්‍රීමත් ආණ්ඩුකාරතුමාගේ කාර්යාලය වෙතින් හෝ එ තුමාගේ අනුශාසකයන් වෙතින් හෝ 1963 නොවැම්බර් මස 7 වන දනමින් එවන ලද ලිපිය පැහැදිලි කර ගැනීමට 1964 ජුනි 20 වෙනි දින චෝදිතයාගෙන් යැවුණු ලිපියට යැවිය යුතු පිළිතුරු පිළිබඳ ව යම් කිසි වැරදීමක් සිදු වී තිබෙන බව පැහැදිලි ව පෙනේ. 1963 නොවැම්බර් මස 7 වෙනි දින චෝදිතයාට ලියා යැවුණු ලිපියෙහි ඔහු නිදහස් කර සමාව දුන් බවක් ප්‍රකාශ වී නැත. එහි ඇත්තේ දඬුවම ඉවත් කළ බවකි. වෙන වචන වලින් කිවහොත් දඬුය අස් කළ බවකි. නමුත් වරදකරු කිරීමේ නියෝගය වෙනස් වී ගිය බවක් එයින් ඒත්තු නොයේ. කරුණු මෙසේ නිසා 1964 අගෝස්තු 5 දින දරණ ලිපියෙහි චෝදිතයා වරදකරු කිරීමේ නියෝගය නිෂ්ප්‍රභාවී යැයි ලියවී ඇති සටහන වැරදි බැව් නිරණය කරමි.

මෙහි පහත පෙනෙන තීන්දුව මෙම නඩුව සම්බන්ධමම ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා විසින් පසුව දෙන ලදී.

ශ්‍රේෂ්ඨාධිකරණය (යාපනයේ චාරිකාවෙහිදිය).

(වර්ෂ 1965 පෙබරවාරි 12 වෙනි දින නියෝගයට යා කිරීම පිණිසයි).

කෑගල්ලේ මහෙස්ත්‍රාත් උසාවිය නො: 38289—ශංසොධන ඉල්ලීම නො. 12/1965 ඒ. පී. ඇන්/සාමාන්‍ය

දිනය : 1965 පෙබරවාරි 19 දින දිය.

අධිකරණ පණත—36 වෙනි ඡේදය—සුප්‍රීම් උසාවියට ඉදිරිපත්කළ ඇපැලක් හෝ වෙන ඉල්ලීමක් විභාග කළ හැක්කේ කොළඹ දි පමණක් ද?

තීන්දුව: අධිකරණ පණතේ 36 වෙනි ඡේදය අනුව සුප්‍රීම් උසාවියට ඉදිරිපත් කළ ඇපැලක් හෝ වෙන ඉල්ලීමක් විභාග කිරීම කොළඹ දි පමණක් කළ යුතු යයි සීමා කර ඇත.

නීතිඥවරු:— වී. ඇස්. ඒ. පුල්ලෙනායගම්, රජයේ අධිනීතිඥ, රංජිත් ධීරරත්න, රජයේ අධිනීතිඥ මහතා සමග ආධාරය සඳහා.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා

මෙම කරුණ වර්ෂ 1965 පෙබරවාරි 12 වෙනි දින කොළඹ නගරයේ දී මා ඉදිරිපිටට එළඹි අවස්ථාවේ එ දින ම මේ සඳහා මා විසින් නියෝගයක් දෙන ලදී. මා යාපනයෙහි චාරිකාවේ සේවය කරන අතර රජයේ අධිනීතිඥ පුල්ලෙනායගම් මහතා විසින් අපරාධ අධිකරණයෙහි විනිශ්චයාසනාරූඪව සිටි මට මේ කරුණ ගැන යළිත් සඳහන් කරණ ලදී.

අධිකරණ ආඥා පණතේ 36 වෙනි ඡේදයෙන් පැණවී ඇත්තේ ශ්‍රේෂ්ඨාධිකරණයෙහි අභියාචන ආඥා බලය අවිශේෂයෙන් ක්‍රියාවෙහි යෙදවිය හැක්කේ කොළඹ නගරයෙහි පමණක් බවය. මෙහි (**අවිශේෂයෙන්**) යන වචනය යොද තිබීමෙන් සෑම අභියාචනයක් හෝ ආයාචනයක් කොළඹ නගරයෙහි පමණක් සළකා බැලිය යුතු ය යන විධානයක් ඉඟිකර නො මැති බව මාගේ මතය යි. නිදසුනක් වශයෙන් දක්වනොත් අපරාධ නඩු විධාන සංග්‍රහයෙහි 343 වන ඡේදයෙන් චාරිකාවරණයෙහි යෙදෙමින් අපරාධ අංශයෙහි නඩු විභාග කරන ශ්‍රේෂ්ඨාධිකරණයෙහි විනිශ්චයකාරවරයෙකුට එම චාරිකා සීමාව තුළට අයත් මහේස්ත්‍රාත් උසාවියකින් ඉදිරිපත් වන අභියාචනයක් චාරිකාවෙහි යෙදෙමින් සිටින තමා ඉදිරියට පැමිණවීමට හැකි යයි ද එසේ පැමිණි විට එයට අනුකූල ව තමා විසින් ඒ ගැන සළකා බැලීමට හැකි යයි ද බලය පැවරී තිබේ.

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දැනට ඉදිරිපත් වී ඇති මෙම ඉල්ලීම ගැන මෙම අධිකරණයට ඒ අවස්ථාවේ දී දැනුම් නො දුන් කරුණු සමහරක් දැන් ඉදිරියට පමුණුවා ඇති නිසා මෙය විශේෂ කරුණු යටතේ කෙමෙරන ඉල්ලීමකි. එම නිසා යාපනයෙහි දීම මේ ඉල්ලීම ගැන සළකා බැලීම නිවැරදි යයි සළකා ගැනීමට කරුණු පෙනේ. කොළඹ නගරයෙහිදී මෙය මා විසින් ම විභාග කළ යුතු යයි නියෝගයක් මෙහිදී කළ හොත් එය මේ කරුණ පිළිබඳ ව අසාධාන ප්‍රමාදයකට හේතු විය හැක. එ බැවින් මෙහිදී මෙම කරුණ මම මේ මොහොතේදීම සළකා බලමි.

ගරු අධිකරණ ඇමතිවරයා ශ්‍රීමත් ලංකේශ්වරයාණන්ට දෙන ලද අවවාදය විමලධම් නැමති චෝදිතයා " නිදහස් කොට සමාව " දියහැකි නම් මැනවි යයි යන්න බව මට දැන් දැනුම්දී තිබේ. මෙම අවවාදය, ඉංග්‍රීසි බසින් දෙන ලදුව ලංකේශ්වරතුමන් විසින් පිළිගෙන තිබේ. නමුත් 7.11.63 දනමින් එවුණු සිංහලෙන් ලියන ලද දෙන දඬුවම අස්කරන ලදැයි පෙන්වන ලිපිය ලියා ඇත්තෙ 328 වන ඡේදය යටතේ නිකුත් වන නියෝගයකට සුදුසු භාෂාව එහි ගැබ් කරමිනි. වර්ෂ 1965 පෙබරවාරි 12 වන දින මගේ නියෝගයෙන් පෙන්වා දුන් පරිදිම කෙනෙකු නිදහස් කර සමාව දීමට ශ්‍රීමත් ලංකාණ්ඩුකාරතුමාට බලය තිබේ. මෙම බලය ගැන කිසි කෙනෙකුට තර්ක කළ නො හැක.

දැන් කෙරුණ විවාදයේ දී ඉදිරිපත් කළ රාජ්‍යභාෂා දෙපාර්තමේන්තුව විසින් පිළියෙල කරන ලද පාරිභාෂික වචන මාලාව "Free Pardon" යන ඉංග්‍රීසි යෙදීම සිංහලෙන් සඳහන් කිරීමට උපයෝගී කර ගැනීමට තරම් සම්පූර්ණ නො වන සේ මට පෙනේ. එම වචන මාලාවෙහි ඇතුලත්ව ඇත්තේ "Pardon" යන ඉංග්‍රීසි වචනය පමණකි. මෙයට සිංහලෙන් දී ඇති පර්‍යාය පදය " සමාව " යන්නයි.

වර්ෂ 1963 නොවැම්බර් මස 7 වන දින දරණ ලිපියෙහි ඉංග්‍රීසි පරිවර්තනයක් ඇතුලත්වී නැත.

එම නිසා විමලධම් නැමති චෝදිතයා වර්ෂ 1964 ජුලි මස 20 වෙනි දින සළිත් ශ්‍රීමත් ලකිසුරුතුමාට 1963 නොවැම්බර මස 7 වෙනි දනමින් එවුණු ලිපිය පැහැදිළි කර ගැනීමට ලියූ විට එය ගරු අධිකරණ ඇමතිවරයා වෙත යවන ලදී. ඇමතිවරයා ඉන් පසු " ශ්‍රීමත් ලංකේශ්වරතුමා වරදකරු කොට දඬගසන ලද මෙම නඩුවේ චෝදිතයා වූ ලියුම්කරු නිදහස් කොට ඇතැයි අවවාද කොට තිබේ. ශ්‍රීමතාණන්ගේ එකී නියෝගයෙන් චෝදිතයා මත පැවරුණ දඬුවම පමණක් නොව **ඔහු වරදට පත් කිරීමද ඒ සමගම මැකී යන බව පෙත්සම්** කරුට දන්වන ලෙස අග්‍රාණ්ඩුකාරතුමාට [illegible] වැඩිදුරටත් අවවාද කෙරේ " යන්න ලියා යවා ඇත. වර්ෂ 1964 අගෝස්තු 5 වෙනි දින ශ්‍රීමත් ලංකාණ්ඩුකාරතුමන්ගේ කාර්‍යාලය විසින් චෝදිතයාට යවන ලද ලියමන ලියා ඇත්තේ මෙම අවවාදයට අනුව ය. එම ලියමනෙහි " Quashed " යන ඉංග්‍රීසි වචනය භාවිතා කරන ලදුව 1965 පෙබරවාරි 12 වෙනි දින දෙන ලද තීරණයට ඉවහල් වූයේ එම වචනයයි.

කරුණු මෙසේ හෙයින් සිංහල බසින් සම්පාදිත නීති අංගයෙහි පාරිභාෂික වචන වල මිදකම නියානුසුදුසු යැයි සැලකිය හැකි වචන යෙදීමෙන් මෙම ලිපිය ලියා ඇති බවත් ශ්‍රීමත් ලංකේශ්වරයාණන් විසින් විනිශ්චයාත්මක බලයක් ක්‍රියාවෙහි යෙදවීමට අදහස් නො කරන ලද බවත් දැන් පෙනීයේ. ඇත්ත වශයෙන් සළකා බලන කලත් කරුණු වශයෙන් සළකා බලන කලත් මෙහි දී චෝදිතයා නිදහස් කොට සමාවක් දී තිබේ. කෙසේ වුවත් මෙසේ නිදහස් කොට සමාව දීම දන්වා යැවීමට අදහස් කරන ලද ලියුම් දෙකෙහි ගැබ් වී ඇති වචන ඉතාම අයෝග්‍ය වන අතර ම එම කාර්‍යයට සම්පූර්ණයෙන් ම නුසුදුසු ය. කෙනෙකු නිදහස් කොට සමාව දීම එම තැනැත්තා වරදට පත්කිරීම අකාමකාලන නමුත් "conviction was quashed" (වරදකරු කිරීම අහෝසි කෙරේ) යන ඉංග්‍රීසි යෙදීම අයෝග්‍යසේ ය. ශ්‍රීමතාණන්ගේ කාර්‍යාංශයට ද දෙස් පැවරීම සුදුසු යයි මම නො සිතමි. එයට හේතුව ඔවුනට හස්තගත කළ හැකි වචන මාලාව අසම්පූර්ණ වීම ය. 1963 නොවැම්බර මස 7 වෙනි දින දරණ ලිපියෙහි "Free Pardon" යන ඉංග්‍රීසි යෙදීම භාවිතා විණි නම් එසේ නැතහොත් යටත් පිරිසෙයින් කාරණාවට අයෝග්‍ය පරිවර්තනයක් දමනු වෙනුවට 1964 අගෝස්තු මස 5 වෙනි දින දරණ ලිපියෙහි එය සඳහන් විණි නම් මේ සියල්ල වළක්වා ගත හැකි ව තිබිණි.

අපරිමිත නීතිගත වචන මාලාවක් අනවරතයෙන් පරිශීලනය වන අධිකරණයන්හි සිංහල බසින් කටයුතු කිරීම ඇරඹීමෙහි ලා ඇති දුෂ්කරතාවය සහ අන්තරාය මේ කරුණින් ඉතා වේගවත් ලෙස අනාවරණය වේ.

කලින් දෙන ලද නියෝගයෙහි දැනටමත් පෙන්වා ඇති හේතූන් උඩ, මහේස්ත්‍රාත්තුමා විසින් විත්තිකරු වරදකරු බවට පත් කොට දෙන ලද නියෝගය අහෝසි කිරීම පිණිස චෝදිතයා විසින් ඔහුගෙන් කරන ලද ඉල්ලීම නිෂ්ප්‍රභා කර තිබීම එසේ ම පවතී.

මෙම නියෝගය වර්ෂ 1965 පෙබරවාරි 12 වෙනි දින දෙන ලද නියෝගයට යා කරනු ලැබේ.

ඉල්ලීම නිෂ්ප්‍රභා කරන ලදී.

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ගරු සන්සෝනි විනිශ්චයකාරතුමා හා සින්නතම්බි විනිශ්චයකාරතුමා ඉදිරිපිටදී

පෙරේරා සහ තවත් කෙනෙක් එ. දයාවති*

ශ්‍රෙ: අ: 87–88 (අප.), 1960—දි: උ: කොළඹ, 7059/පී එන්.

තර්ක කොට තීන්දු කෙළේ : 1962 පෙබරවාරි 20 ද.

බෙදුම් නඩු පණත (69 වෙනි අධිකාරය), 53 (1) (බී) ඡෙදය—උසාවියෙන් නිකුත් කළ බලය පිට ඉඩමක් බෙද වෙනස් කිරීමට ගිය මිනින්දෝරුවකුට අවහිර කිරීම—උසාවියට අපහාස කිරීමේ චෝදනාව—අවහිර කළ අවස්ථාවේ ඉඩමේ නො සිටි කෙනෙක් අවහිර කල අය ඊට පෙලඹුවා යයි දඬුවම් දිය යුතු ද ?

තීන්දුව:— බෙදුම් නඩු පණත අනුව උසාවියෙන් බලයලත් මිනින්දෝරුවෙක් ඉඩමක් බෙද වෙනස් කිරීමට පැමිණි අවස්ථාවේ ඔහුට අවහිර කළ නිසා බෙදුම් පණතේ 53 (1) (බී) ඡෙදය යටතේ උසාවියට අපහාස කළේ යයි යන චෝදනාවට ඇත්තෙන් ම අවහිර කළ අය පෙලඹුවා යයි කියා ඉඩමේ ඒ අවස්ථාවේ නො සිටි අන්කෙනෙකු වරදකරුවකු නොවේ.

නීතිවේදීහු:— රාජනීතිඥ ජී. ඊ. චිට්ටි, නෙවිල් විජේරත්න සමග, ඇපැල්කාර–වගඋත්තරකරු වෙනුවෙන්.
පැමිණිලිකාර–වගඋත්තරකරු වෙනුවෙන් කිසිවකු පෙනී සිටියේ නැත.
රජයේ අධිනීතිඥ එස්. පසුපති, අධිකරණ සහායක වශයෙන්.

ගරු සන්සෝනි විනිශ්චයකාරතුමා

මේ බෙදුම් නඩුවේ මූල් තීන්දු ප්‍රකාශයේ සඳහන් ඉඩම බෙද වෙන් කිරීම පිණිස, දිස්ත්‍රික් නඩුකාරයා විසින් මිනින්දෝරුවකුට නිකුත් කරන ලද කොමිසම අනුව, ඒ කොමිසම ඉටු කිරීමට මිනින්දෝරුවා ඉඩමට ගොස් ඇත. ඇපැල්කාර ප්‍රෙමදස, ඔහුට ඉඩමට ඇතුල් වීමට ඉඩ නොදී අවහිර කොට ඇත. මේ ඉඩමේ කොටසකට හිමිකම් දක්වන ඇපැල්කාර වික්ටර් පෙරේරා විසින් මේ අවහිර කිරීමට ප්‍රේමදස පොළඹවා ඇති බව පිලිගත යුතුව ඇත. එහෙත්, ඔහු ඉඩමේ නො සිටි නිසා, කොමිසම ඉටු කිරීම වලක්වා ලීමට ඔහු කිසිවක් කොට ඇතැයි කීමට නුපුළුවන.

විභාග කිරීමෙන් පසුව, ඇපැල්කරුවන් දෙදෙනා ම, බෙදුම් නඩු පණතේ (69 වැනි අධිකාරය), 53 (1) (බී) ඡෙදය යටතේ, උසාවියට අපහාස කිරීමේ වරදකරුවන් බව දිස්ත්‍රික් නඩුකාරයා තීරණය කොට, එකාට රු: 250/- ගණනේ දඩ ගසා, දඩය ගෙවීම පැහැර හැරි–යොත් සති හයක බරපතල වැඩ සහිත බන්ධනාගාර ගත කිරීමක් නියම කෙළේ ය. ඇපැල්කාර වික්ටර් පෙරේරා ඒ ස්ථානයේවත් නො සිටි නිසා, අවහිර කිරීමට ප්‍රෙමදස පෙළඹ වීමේ ඔහුගේ ක්‍රියාව කෙතරම් දෝෂාරෝපණය ලද යුත්තක් වුවත්, ඔහු වරද කරුවකු වශයෙන් පිලිගත නො හැකි යයි යන්න පිලිබඳ ව කිසියම් සැකයක් ඇති වන්නට පුළුවනැ'යි අපි නො සිතමු. එම නිසා ඔහු වරදකරු කිරීම අවලංගු කළ යුතුය. එහෙත්, මේ ඉඩම මේ නඩුවේ විෂය වස්තුව (subject matter) බවත්, උසාවිය විසින් නිකුත් කරන ලද කොමිසමක් ඉටු කිරීමට මිනින්–දෝරුවා පැමිණි බවත් හොඳාකාර දන සිටි ප්‍රෙමදස සම්බන්ධයෙන් නම්, උසාවියට අපහාස කිරීමේ වරද පැහැදිලිව ම ගැලපෙන බව අපි සිතමු. මිනින්දෝරුවාට අවහිර කිරීමට වික්ටර් පෙරේරා ඔහුට කීවේ යැයි කීම සහාවට කරුණක් නොවේ. ඔහුගේ යුතුකම වී තිබුනේ කොමිසම ඉටු කිරීමට ඉඩ හැරීම ය. මේ ඉඩමට යම් කිසි අයිතිවාසි කමක් පෙරේරාට තිබුණේ නම්, එය නියි පරිදි උසාවිය ඉදිරියට ගෙන ඒමට පුළුවන්කම තිබිණි. සිද්ධීන් අනුව මිනින්දෝරුවාට අවහිර කිරීමක් සිදුවූයේ නැතැයි කියා නැති හෙයින් ඔහු වරදකරු කිරීම පැහැදිලි වශයෙන් ම නිවැරදි ය. එම නිසා ඔහුගේ ඇපැල නිෂ්ප්‍රභා කෙරෙයි.

ගරු සින්නතම්බි විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

පළවැනි ඇපැල්කරුගේ ඇපැලට ඉඩ දෙන ලදී.

දෙවැනි ඇපැල්කරුගේ ඇපැල නිෂ්ප්‍රභා කරන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 36 වෙනි පිට බලන්න.

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ගරු අලස් විනිශ්චයකාරතුමා ඉදිරිපිටදී

වෙල්ලසාමි එ. ඇන්. කිව්. ඩයස් සහ තවත් කෙනෙක්*

විදේශකටයුතු හා ආරක්ෂක අමාත්‍යංශයේ ස්ථිර ලේකම් ඇන්. කියු. දියෙස් මහතා වෙත තහනම් ආඥවක් නිකුත් කිරීමට කරන ලද ඉල්ලීමකි.

ශ්‍රේෂ්ඨාධිකරණයේ අංක නො: 30/1965.

විවාද කොට තීරණය දුන් දිනය : 1965 මාර්තු මස 1 වෙනි දින දී.

අධිකරණ ආඥ පණත (1 වන පරිච්ඡේදය) 20 වන ඡේදය—පදිංචියට "වීසා" බලපත්‍රයක් තාවකාලික දීමට යයි කරණ ලද ඉල්ලීමක් ප්‍රතික්ෂේප කිරීමට විරුඩව දිස්ත්‍රික් උසාවියේ දැමීමට අදහස් කරණු ලබන නඩුවක් ඇති නිසා ඒ අතර පෙත්සම්කරු ලංකා ද්වීපයෙන් ඉවත් නො කරණ ලෙස තහනම් නියෝගයක් යාඥ කරමින් කරණ ලද නියෝගයක් ඉල්ලීම—මේ සඳහා උසාවිය තෘප්තියට පත් විය යුත්තේ කවර කරුණු උඩ ද යන්න.

සිවිල් නඩු විධාන සංග්‍රහයේ 461 වන ඡේදයට අනුව නිවේදනයක් දී වගඋත්තරකරුවන්ට විරුඩව දිස්ත්‍රික් උසාවියේ දැමීමට අදහස් කරණ ලද නඩුවක් තිබුව් නැති අතර තමා ඔවුන් විසින් ලංකා ද්වීපයෙන් බැහැර කිරීම තහනම් කර ඔවුන්ට උපදෙස් දෙන තහනම් නියෝගයක් ලබා ගැනීමට පෙත්සම්කරු අධිකරණ ආඥ පණතේ 20 වන ඡේදය යටතේ යාඥ කෙළේ ය.

ඔහුගේ පෙත්සමේ පහත සඳහන් පරිදි ප්‍රකාශ ද සැලකර තිබිනි :—

(ඒ) මේ නඩුවේ දෙවන වගඋත්තරකරු වූ ආගමන විගමන පාලක නිලධාරියා සාවද්‍ය ලෙස හා නීති විරෝධී ලෙස ක්‍රියා කරමින් ද තමා පිට පැවරි ඇති බල තල වරදවා ක්‍රියා කරවීමෙන් හෝ ඒවා ඉක්මවා ක්‍රියා කිරීමෙන් හෝ ඔහුට "වීසා" බල පත්‍රයක් දීම ප්‍රතික්ෂේප කිරීම :

(බි) අදහස් කරණ ලද නඩුව දිස්ත්‍රික් උසාවියේ දැමීමට පෙර ඔහු ලංකා ද්වීපයෙන් බැහැර කිරීමෙන් ඔහුට දුස්සාධ්‍ය අලාභහානි සිදුවීමට හේතු ඇති වීම.

තමා පිට පැවරි ඇති අභිමතය නිර්ව්‍යාජ ලෙස ක්‍රියාවේ යෙදීමෙන් පෙත්සම් කරුට "වීසා" බලපත්‍රයක් දීම ප්‍රතික්ෂේප කළ බැව් දෙවන වගඋත්තරකරු තමාගේ දිව්රුම් පෙත්සමින් සැලකර සිටියේ ය.

තීන්දුව:— (1) ලක්දිවින් බැහැර කිරීමෙන් තමාට දුස්සාධ්‍ය අලාභහානි සිදු වෙයයි ඔප්පු කිරීමට සහ වගඋත්තර-කරුවන් විරුඩව අදහස් කරණ ලද අයුරින් නඩුවක් දැමීමට තමාට නඩු නිමිත්තක් ලැබී ඇති බව ඔප්පු කිරීමට නො හැකි වී ඇති නිසා පෙත්සම්කරු අයැද සිටි පරිදි තහනම් නියෝගයක් ලැබීමට සුදුසු තත්ත්වයක් නැත.

(2) මෙම ඉල්ලීමේ දී පෙත්සම්කරුට තමා ලක්දිවින් බැහැර කිරීමෙන් දුස්සාධ්‍ය අලාභහානි සිදු විය හැකි බව ගැන පමණක් නොව වගඋත්තරකරුවන්ට විරුඩව තමාට නීතියුක්ත නඩු නිමිත්තක් ඇතිවීම ගැන උසාවිය සෑහීමකට පත් විය යුතු ය.

සඳහන් කළ නඩු:— මොහමඩු එ. ඊබ්‍රහිම්, 2 න. නී. වා. 36.

නීතිඥවරු:— රාජනීතිඥ ඇම්. තිරුචෙල්ලම් මහතා, නිහාල් ජයවික්‍රම සහ ඇම්. රාධාක්‍රිෂ්ණන් මහතුන් සමග, ඉල්ලුම්කරු වෙනුවෙන්.

රජයේ නීතිඥ එච්. ඇල්. ද සිල්වා මහතා, වගඋත්තරකරු වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 37 වෙනි පිට බලනු.

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ගරු අලස් විනිශ්චයකාරතුමා

මෙය වනාහි පෙත්සම්කරු දිස්ත්‍රික් උසාවියේ දැමීමට අදහස් කර සිටින නඩුවක් නිමාවට පත්වනතුරු ඔහු ලංකාවෙන් ඉවත් කිරීම වැළක් වෙන ලෙස තහනම් නියෝගයක් වගඋත්තරකරුට නිකුත් කිරීමට කරන ලද ඉල්ලීමකි.

වර්ෂ 1964 ඔක්තෝම්බර මස 16 වන දින ලංකාවේ තමාට සිටිය හැකි කාලසීමාව අතික්‍රාන්ත කොට වාසය කරන ලදැයි පෙත්සම්කරු අල්වාගන්නා ලදී. එහෙත් වර්ෂ 1965 ජූලි මස 7 වන දක්වා එ දිනත් ඇතුළු වූ කාල පරිච්ඡේදයට ඔහු විසින් ගෙවන ලද වීසා තක්සේරුව සහ ඔහු විසින් කරන ලද නියෝජනය ද සලකා බැලීමෙන් පසු ඔහු නිදහස් කර හරින ලද්දේ ය. අධිකරණ ආඥා පණතේ 20 වන ඡේදය යටතේ මෙම අධිකරණයට ඉදිරිපත් කරන ලද මේ පෙත්සමෙන් අයැද සිටින්නේ මෙම නඩුව මුලික උසාවියට ඉදිරිපත් කිරීමට පෙර පෙත්සම්කරුට සිදුවියහැකි දුස්සාධ්‍ය අලාභහානි වැළැක් වෙන ලෙස තහනම් නියෝගයක් මෙම උසාවියෙන් නිකුත් කෙරෙන ලෙස ය.

මොහොමඩ් ඒ. ඊබ්‍රහිම් අතර කියවී 2 න.නී.වා., 36 වන පිටේ වාර්තාවී ඇති නඩුවේ මෙ බඳු තහනම් නියෝගයක් දීමේදී සලකා බැලිය යුතු ප්‍රතිපත්ති අග්‍ර-විනිශ්චයකාර බොන්සර් මහතා විසින් විස්තර කොට දක්වා තිබේ. එහි දී බොන්සර් අග්‍රවිනිශ්චයකාරතුමා මෙසේ කීය : ''තහනම් නියෝගයක් දීම ඉතාම ගරුක ලෙස සීමාවී තිබෙන්නකි. එය ක්‍රියාවෙහි යෙදිය යුත්තේ විශේෂ හේතු සහ ඒයට අදල විශේෂ කරුණු උද්ගත වූ අවසථාවක පමණකි. එම කරුණු මෙසේය : (1) ඉල්වන තහනම් නියෝගයෙන් වැළැක්වෙන සිඩිය නිසා දුස්සාධ්‍ය අලාභහානි සිදුවිය හැකිවීම ; (2) යම් කිසි මූලික උසාවියක තහනම් නියෝගයක් දිය හැකි නඩුවක් පවරා තිබීම ; (3) පැමිණිලිකරුට එම මූලික උසාවියට ඉල්ලීමක් ඉදිරිපත් කිරීමට නො හැකිවන සේ යම් කිසි සම්බාධකයක් ඉදිරිපත් වී තිබීම''.

පෙත්සම්කරු තමාගේ පෙත්සමෙහි ලංකාවේ ආගමන හා විගමන පාලකයා වූ දෙවන වගඋත්තරකරු ''වරදවා රාජකාර්‍ය්‍ය කිරීමෙන් සහ නීතිවිරෝධී ලෙස තම කාර්‍ය්‍ය කිරීමෙන් ද තමා වෙත පැවරී ඇති බලතල ඉක්මවා කටයුතු කිරීමෙන් හෝ ඒ බලතල වරදවා භාවිතා කිරීමෙන් හෝ පෙත්සම්කරුට නීත්‍යානුකූල තාවකාලික නිවාසී බලපත්‍රයක් දීමට කළ ඉල්ලීම ප්‍රතික්ෂේප කොට තිබේ'' යයි කියා ඇත. මෙම ප්‍රකාශයට පිළිතුරු වශයෙන් දෙවනි විත්තිකරු ''තමා වෙත පැවරී ඇති අභිමතය නිර්ව්‍යාජ ලෙස ක්‍රියාවේ යෙදවීමෙන් පෙත්සම්-කරුට ලංකා ද්වීපයෙහි වාසය කිරිමට තාවකාලික බලය පැවරෙන අවසරයක් දීම ප්‍රතික්ෂේප කළේ මෙම නඩුවෙහි මතුවී ඇති කරුණු ගැන සළකා බැලීමේ දී එය රජයේ ප්‍රතිපත්තියට ප්‍රතිවිරෝධ පියවරක් ලෙස සැළකෙන ලද නිසාය'' යි කියා තිබේ.

රජය වෙනුවෙන් පෙනී සිටි නීතිවේදියා මෙම පෙත්-සමේ 9 වන ඡේදයෙහි ගැබ්වී ඇති ප්‍රකාශ සියල්ල ම නීතිය පිළිබඳ ප්‍රකාශ බවත් ඒ නයින් බලන කල දෙවන වගඋත්තරකරු වැරදි ලෙසත් නීතිවිරෝධී ලෙසත් තමාගේ බලතල ඉක්මවා යැවෙන ලෙසත් ක්‍රියා කර තිබේ යයි පෙත්සම්කරු විසින් සැළකර සිටීම නියම හේතු ඇතිව සිදුවී නැතැයි කියමින් කරුණු ඉදිරිපත් කළේ ය. තවදුරටත් කිවහොත් ලංකා ද්වීපයෙන් බැහැර කිරීමෙන් පෙත්සම්කරුට සිදුවිය හැකි දුස්සාධ්‍ය අලාභහානි ඇති බවට ද කොහෙත්ම සාක්ෂි නැත. එම නිසා මෙම අධිකරණයෙන් තහනම් නියෝගයක් ඉල්වීමට හේතු වූ කරුණු මා තෘප්තියට පත්වන සේ පෙත්සම්කරු තහවුරු කර නො මැති බව කිව යුතු ය. පෙත්සමේ 9 වන ඡේදයෙහි ඇතුලත් ව ඇති ප්‍රකාශ ගැන සැලකීමේදී මෙ බඳු නඩු විභාගයක් පැවැත්වීමට වගඋත්තරකරුවන්ට විරුඬව පියවර ගැනීමට පෙත්සම්-කරුව නඩු නිමිත්තක් ඉදිරිපත්වී නැතියේ පෙනී යන ලෙස හැහේ. තවද සිවිල් නඩු විධාන සංග්‍රහයේ 461 වන ඡේදය යටතේ පෙත්සම්කරු දැනුම් දී ඇත්තේ දෙවන විත්තිකරුට විරුඬව නඩුවක් දැමීමට පියවර ගැනීමට ඔහු අදහස් කරන්නේ පහත සඳහන් කරුණු යාඥ කරන බව කියමිනි : ''(ඒ) පළමුවන වගඋත්තර-කරුට වර්ෂ 1965 ජූලි මස 7 වන දිනතෙක් මෙරට නිවාසයට නීත්‍යානුකූල බලපත්‍රයක් දීමට නියෝග කෙරෙන ප්‍රකාශයක් ඉල්ලීම''. මෙම යාඥවට ඉඩ දීමට අධිකරණයට නුපුළුවන. ආගමන විගමන ආඥ පණතේ 17 වන ඡේදයට අනුව මෙ බඳු ඉල්ලීමක්

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සළකා බලා නිගමනයකට බැසීමට අයිතියක් ඇත්තේ ආගමන විගමන පාලකයාට පමණකි. නමුත් තමාගේ පෙත්සමෙහි පෙත්සම්කරු සැළකර සිටින්නේ දෙවන වගඋත්තරකරු (ආගමන විගමන පාලකයා) යම් කිසි නිතිගත යුතුකමක් තමා වෙත ඉටු කිරීමට ගැතිවී සිටින බවකි. එය එසේ නම් පෙත්සම්කරුගේ නියම පිළිසරණ ලැබෙන්නේ වගඋත්තරකරුට විරුඬව මැන්ඩැමුස් ආඥාවක් ලබා ගැනීමෙනි.

පෙත්සම්කරු වෙනුවෙන් පෙනී සිටින තිරුවෙල්ලම් මහතා සැළකර සිටින්නේ මෙම ඉල්ලුම්පත්‍රය කුමන කරුණු උඩ කර තිබේ දැයි යන කරුණ ගැන සලකා බැලීමට මෙම උසාවියට අවසර නොමැති බවකි. ඔහුගේ තර්කය වී ඇත්තේ මේ කරුණු එයට සුදුසු නඩුවකදී මූලික උසාවියේ සලකා බැලියයුතු දේ බවයි. මෙයට එකඟවීමට මට නො හැක. මා අතට පත් මෙම ඉල්ලීම් පත්‍රය සම්බන්ධව ක්‍රියා කිරීමේදී පෙත්සම්කරුට තමා ලංකා ද්වීපයෙන් බැහැර කිරීමෙන් දුස්සාධ්‍ය අලාභහානි සිදුවන බවට සහ තව දුරමත් වගඋත්තර–කරුවන්ට විරුඬව ඔහුට නීත්‍යානුකූල නඩු නිමිත්තක් ඇති බවටත් මා සෑහීමකට පත්විය යුතු ය. මෙම කරුණු දෙක ගැනම් සාක්ෂි කොහෙත්ම නො මැති නිසා එහි ප්‍රතිඵලයක් වශයෙන් මෙම ඉල්ලීම අසාර්ථක විය යුතු ම ය.

විවාදය අවසානයේ දී පෙත්සම්කරු වෙනුවෙන් පෙනී සිටි අධිනීතිඥවරයා පෙත්සම්කරු දිස්ත්‍රික් උසාවියෙන් අතුරු ඉන්ජන්ක්ෂන් තහනමක් සාර්ථක ලෙස ලබා ඇති බව තමාට දැනගන්නට ලැබුණු බව කියමින් මෙම ඉල්ලීම අස්කර ගැනීමට අවසර ඉල්ලා අටියේ ය. නමුත් මෙම උසාවියටත් ඒ කරුණ සඳහාම ඒ කාලයේ ම ඉල්ලීමක් ඉදිරිපත් කොට ඇති බව දිස්ත්‍රික් උසාවියට සැලකර සිටින ලද්දේ ද යන බව පිළිබඳ ව මට පැහැදිළි කිරීමට අධිනීතිඥවරයාට නො හැකි විය.

රජය වෙනුවෙන් පෙනී සිටි අධිනීතිඥවරයා කෙසේ හෝ ඉල්ලා සිටියේ දැනට මා අතට පත් වී ඇති මේ ඉල්ලීම එහි ඇති යෝග්‍යතාවය උඩ ම සලකා බලන ලෙස ය. මගේ අදහසේ හැටියට පෙත්සම්–කරුට ජය ගැනීමට සුදුසු තත්ත්වයක් එළඹෙන සේ මා ඉදිරියට ගෙනා කරුණු පිළිබඳ ව ඔහු මෙම අධිකරණය තෘප්තියට පත් කොට නැත යන්නයි. එ බැවින් ගාස්තුවට ද යටත් කොට ඉල්ලීම මා විසින් ප්‍රතික්ෂෙප කරන ලදී.

ඉල්ලීම නිෂ්ප්‍රභා කරන ලදී.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිටදී

ඒ. ඇල්. පේද්‍රිස් නො හොත් ඩේවිඩ් එ. තෙන්නකෝන් (පී.සී. 2311)*

සු: උ: නො: 1424/64—මහේස්ත්‍රාත් උසාවිය, හම්බන්තොට, නො: 43873.
(තිස්සමහාරාමයේ දී පැවත් වූ)

වාදකර තීන්දු කළ දිනය : 1965.7.2.

දණ්ඩ නීති සංග්‍රහය, 419 වෙනි වගන්තිය—ගිනි තියා අනර්ථ කළාය යන චෝදනාව—මනුෂ්‍ය වාසයට ගෙයක්.

නීතිඥවරු:— ඇන්. සේනානායක, පළමුවෙනි විත්තිකාර–ඇපැල්කරු වෙනුවෙන්.
ඒ. ඇන්. රත්නායක, රජයේ අධිනීතිඥ, ඇටෝර්නි–ජනරාල්තුමා වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

දෙවෙනි විත්තිකරු වූ කරුණාරත්නට ඉඩම් බෙදා වෙන් කර දී තිබෙන බව පැමිණිලිකරු විසින් පොලිසියට කියා තිබේ. එසේ වුවත් පැමිණිලිකරු ගොස් මෙම ඉඩමේ පැල්පතක් සාද තිබේ. ඔහු ඊට රුපියල් 475/- ක් වියදම් කළේ යයි කීම විශ්වාස නො කළ හැක්කකි. පරීක්ෂකතැනගේ කීම පරිදි සිදු වූ අලාභය රුපියල් පනහක් පමණකි.

මේ පැල්පත සාදන්ට යැමෙන් පැමිණිලිකරු ඔහු වෙතට කරදර ලඟාකර ගෙන තිබේ. මේ පැල්පත පැමිණිලිකරු විසින් සාදන්ට යෙදුනේ උදේ කාලයේය. එය පුළුස්සා දමා ඇත්තේ එ දිනම දවල් දෙකට ය. එම නිසා එය සාමාන්‍යයෙන් මිනුෂ්‍ය වාසයෙහි යෙදූ ගෙයක් නො වන්නේ ය. එසේ නම් දණ්ඩ නීතියේ 419 වෙනි වගන්තිය යටතේ එය අදල කර ගෙන ඉදිරිපත් කළ චෝදනාව නිශ්ප්‍රභා විය යුතුයි.

විත්තිකරු නිදහස් කරන ලදී.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 68 වෙනි කා., 38 වෙනි පිට බලනු.

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ගරු එච්. එන්. ජී. ප්‍රනාන්දු, ජ්‍යෙෂ්ඨ විනිශ්චයකාරතුමා හා ටී. එස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

බේබිනෝනා රත්නවීර එ. ලියන පටබැඳිගේ සහ තවත් අය*

ශ්‍රෙ. නො. 586/63—දි. උ. කෑගල්ල, නො. 6207.

විවාද කළේ : 1965, ජූනි මස 4 වෙනිද.
තීන්දු කළේ : 1965, ජූනි මස 22 වෙනිද.

උකස් ඔප්පු පිළිබඳ නඩුවක්—උකස් තැබූ ඉඩමක් නඩු තීන්දු ප්‍රකාශයක් යටතේ විකිණීම—මිල දී ගන්නාට භුක්තිය භාරදීමට යයි පිස්කල් නිලධාරියාට අණදීම—ඊට නොබෝ දිනකට පසු නඩුවක් පවරා ඇති බව කියවෙන **(lis pendens)** ප්‍රකාශය ලියා පදිංචි කල පසු උකස්කරුගෙන් හිමිකම ලබාගත් තැනැත්තකු විසින් විකිණීමේ ආඥාව ආපසු ගෙන්වා ගැනීමට කළ ඉල්ලීමක්—ඉල්ලීමට ඉඩදුන් අධිකරණය ඒ බව පිස්කල් නිලධාරියාට නිවේදනය නො කිරීම—එම තැනැත්තා විසින් ම තමාට භුක්තිය පැවරීමට යයි කළ දෙවන ඉල්ලීමට අධිකරණය ඉඩ දීම—මෙම නියෝගය නිවැරදි ද යන්න.

උකස් පණත (89 වන පරිච්ඡේදය) 5, 16, 34, 35, 36, 54 සහ 55 වන ඡේද.

උකස් ඔප්පුවක් පිළිබඳ නඩු තීන්දු ප්‍රකාශයක් ක්‍රියාත්මක කිරීමෙහි ලා විකුණන ලද ඉඩමක් මිලට ගත් ඇපැල්කරුට අධිකරණ නියෝගයකට අනුව පිස්කල් නිලධාරිතැන විසින් භුක්තිය සන්තක කරණ ලදී. නමුත් වගඋත්තරකාරි විසින් උකස්කාර–විත්තිකරු නඩුතීන්දු ප්‍රකාශයට පසු ව ඉඩමේ හිමිකම තමාට පවරණ ලද්දැ යි කියමින් කළ ඉල්ලීමක් අනුව නොබෝදිනකින් එම ආඥාව ආපසු ගෙන්වා ගැනීමට නියෝගයක් ලබා ගන්නා ලදී. තීන්දු ප්‍රකාශය ක්‍රියාත්මක කිරීම නවත්වන ලද මෙම නියෝගය යථා කාලයේ පිස්කල් නිලධාරිතැනට නො දන්වන ලද්දැ යි වගඋත්තරකාරිය භුක්තිය තමාට පවරණ ලෙස අධිකරණයෙන් යළිත් ඉල්ලීමක් කළා ය. මෙම ඉල්ලීමට උසාවිය ඉඩ දුන්නේ ය. මෙම නියෝගයට විරුඩ ව ඉදිරිපත් කරණ ලද ඇපැලේ දී පහත සඳහන් පරිදි තීන්දු විය:—

තීන්දුව : (1) මෙම උකස් නඩුවේ පැමිණිලිකරු උකස් පණතේ 34, 35, සහ 36 යන ඡේදවල ඇතුළත් ව ඇති සම්ප්‍රදායට අනුව ක්‍රියා නොකළ නිසා මිලට ගත් අයට භුක්තිය දීමේ නියෝගය පණතේ 54 වන ඡේදයට අනුකූල ව කළ යුතු ය.

(2) උකස් නඩුවක් විනිශ්චයට භාජනව් ඇති බැව් ප්‍රකාශ කිරීම (lis pendens) ලියාපදිංචි කළ පසු පණතේ 16 වන ඡේදයට අනුව වගඋත්තරකාරිය නඩුවේ තීන්දුවට යටත් විය යුතු කෙණෙකු වීමේ හේතුවෙන් ඊට පසු ඉඩමේ අයිතිය උකස්කරුගෙන් ලත් ඇට මිල දී ගත් අයට විරුඩ ව එය භුක්ති විඳීමට බලය නැත.

(3) එම නිසා වගඋත්තරකාරියට ඉඩමේ භුක්තිය සන්තක කිරීමට යයි පිස්කල් නිලධාරිතැනට දෙන ලද නියෝගය ඉවත් කර දැමිය යුතු ය.

නීතිවේදීහු: ඩී. ආර්. පී. ගුණතිලක, ගැණුම්කාර–ඇපැල්කරු වෙනුවෙන්.
වගඋත්තරකරුවන් වෙනුවෙන් කිසිවෙක් පෙනී නොසිටියේ ය.

ගරු එච්. එන්. ජී. ප්‍රනාන්දු, ජ්‍යෙෂ්ඨ විනිශ්චයකාරතුමා

මෙම උකස් නඩුවේ උකස් තීන්දු ප්‍රකාශය පැණවීමෙන් ඉක්බිති උකස් කරන ලද දේපොල එකී තීන්දු ප්‍රකාශය ඇස්කිසි කිරීම් වශයෙන් විකුණන ලදුව, මෙම ඇපැල්කරු විසින් මිළ දී ගන්නා ලදී. අනතුරුව, ඇපැල්කරු වෙත එකී දේපළ පිළිබඳ භුක්තිය පවරන ලෙස උසාවියෙන් අණ කරන ලද්දෙන්, පිස්කල්තැන විසින් ඇපැල්කරු භුක්තියෙහි පිහිටුවන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 47 වෙනි පිට බලනු.

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උකස් තීන්දු ප්‍රකාශය පැණවීමෙන් පසු ව, උකස්කාර-විත්තිකරු විසින් වගඋත්තරකරු වෙන මෙම දේපළ පවරන ලදූ යි යන පදනම මත පිහිටා මෙම දේපළ සම්බන්ධයෙන් අයිතියක් ඉදිරිපත් කළ මෙම වග-උත්තරකරුගේ ඉල්ලීමකට ඉඩ දෙමින්, ඇපැල්කරු භුක්තියෙහි පිහිටුවීමට කෙටි කාලයට පෙර, උසාවිය විසින් භුක්තිය පිළිබඳ දුන් ආඥාව නතර කිරීමට නියෝග කරන ලද බව පෙනේ. ආඥාවෙහි ඇස්කිසිය අත්හිටුවීම සම්බන්ධ මෙකී නියෝගය ක්‍රියාත්මක කිරිම සඳහා පිස්කල්තැන වෙත කල්වේලා ඇතිව දැනුම් දී නො මැත. කෙසේ වෙතත්, ඉනික්බිති ව වගඋත්තරකාරිය තමා වෙත භුක්තිය ආපසු පැවරිය යුතු යයි සැළ කොට උසාවියෙහි පෙනී සිටියා ය. 1963 ජූලි මස 30 වෙනිද නිකුත් කරන ලද නියෝගයෙන් දිස්ත්‍රික් නඩුකාරතුමා විසින් මෙම ඉල්ලීමට ඉඩ දී තිබේ. මෙම ඇපැල ඉදිරිපත් කොට ඇත්තේ මෙම නියෝගයට විරුඩව ය.

තමා විසින් නිකුත් කරන ලද ආඥාව ඇස්කිසි වීම අත්හිටුවමින් දිස්ත්‍රික් නඩුකාරතැන විසින් කරන ලද නියෝගය පැනවීමට හේතුව වශයෙන් දක්වා ඇත්තේ උකස් පණතේ 55 වැනි ඡේදය යටතේ තමාට එ වැනි ආඥාවක් පැණවීමට බලයක් තිබී යයි සිතුව ද, එම ඡේදය මෙකී කරුණට අදල නො වන බව පසු ව අව-බෝධ වීමයි. පැමිණිලිකරු මෙකී පණතේ 34, 35 සහ 36 වැනි වගන්ති වලින් දක්වා ඇති පිළිවෙළට මේ උකස් නඩුව පවරා නොමැති හෙයින්, විනිසකරුගේ මෙම නිගමණය නිවැරදි ය. එහෙත් වගඋත්තරකරුට යලිත් භුක්තිය පැවැරිය යුතු යයි පසු ව තීන්දු කිරීමේ දී, උගත් විනිශ්චයකාරතැන පණතේ අදල වූ කොන්දේසි සැලකිල්ලට භාජනය කර නොමැත. ඇතැම් විට මෙම කොන්දේසි කෙටියෙන් පැහැදිලි කිරීම උපකාර-වත් විය හැක.

පණතේ 5 වැනි ඡේදයෙන්, ඉඩම් සම්බන්ධ උකස් නඩුවක දී, "නඩුව පිළිබඳ ව දැනුම් දිය යුතු පුද්ගලයන්" හඳුන්වා දෙනු ලැබේ. මේ පුද්ගලයන් වනාහි උකස් නඩුවට විශෙෂත්වයක් ඇති කරවන, ඉඩම සම්බන්ධ-යෙන් බලතල පැවරෙන ලියවිලි ඇත්තාවූ ද, උකස් නඩුවේ "ලිස් පෙන්ඩෙන්සය" ලියා පදිංචි කිරීමට පෙරාතුව ලියා පදිංචි කරන ලද එකී ලියවිලි ඇත්තාවූ ද අය ය.

අනතුරු ව මෙකී පණත විසින් දැනුම් දිය යුතු සැම පුද්ගලයන් ම එක්කෝ මුල් පාර්ශවකාරයන් වශයෙන් හෝ පසු ව සංයෝජන කිරීම් වශයෙන් හෝ නඩුවට සම්බන්ධ කිරිම පිණිස අවකාශ සලසා ඇත. එසේ ම උකස් තීන්දු ප්‍රකාශය නිකුත් කිරිමට පෙරාතු ව, දැනුම් දිය යුතු පුද්ගලයකු එසේ සම්බන්ධ නො කිරිම නිසා යම් හෙයකින් උද්ගත විය හැකි තත්ත්වය සඳහා ද මෙම පණතින් පිළියම් යොද ඇත.

උකස් නඩුවේ "ලිස් පෙන්ඩෙන්සය" ලියා පදිංචි කිරිමෙන් පසු ව, උකස්කරුගෙන් අයිතිය ලබන්නා වූ, වගඋත්තරකරුගේ තත්ත්වයෙහි සිටින පුද්ගලයකු නඩුව පිළිබඳ ව දැනුම් ලැබිය යුතු පුද්ගලයකු නො වන්නේ ය. එසේ හෙයින් (උගත් විනිසකරු සාවද්‍ය ලෙස නිගමණය කළ පරිදි) එ වැන්නකු උකස් තීන්දු ප්‍රකාශයෙන් බැඳී නොමැති යයි නිගමණය කල නොහේ. මෙ වැනි තත්ත්වයක් සම්බන්ධයෙන් 16 වැනි ඡේදය ඉඩ සලසා දී ඇති අතර, එ වැනි පුද්ගලයකු "උකස් නඩුවේ දී උද්ගත වන සැම නියෝගයකින් හෝ තීන්දු ප්‍රකාශයකින් හෝ විකුණුම් කිරිමකින් හෝ ක්‍රියා මාර්ගයකින් හෝ බැඳී පවතින" බව මුඛ්‍ය ලෙස ම ප්‍රකාශ කරයි. යම් කොන්දේසි යටතේ එ වැනි පුද්ගලයකු නඩුවේ පාර්ශව-කාරයකු වශයෙන් සම්බන්ධ කිරීමට අවසර දීමට උසාවියට බලය පවරන, එම ඡේදයෙහි සැලකිල්ලට භාජනය කිරීම අභිමුඛ කාර්‍යය සඳහා අදල නොවේ.

මෙම නඩුවෙහි දී භුක්තිය ඇති කරනු සඳහා නියම නියෝගය පණතේ 54 වැනි වගන්තිය යටතේ නිකුත් කළ යුතු ව තිබිණ. එ වැනි නියෝගයක් කළ තිබී නම්, 16 වැනි වගන්තිය යටතේ මෙම වගඋත්තර-කරුවන් බැඳී සිටිනු ඇත. මේ අනුව, මෙම ආඥාව 55 වැනි වගන්තිය යටතේ නිකුත් කරන ලදූ යි යන හුදු න්‍යායාත්මක පැමිණිල්ල විනා වෙනෙකක් වග-උත්තරකරුට නොමැත. උකස් තීන්දු ප්‍රකාශය විසින් ඇය බැඳී සිටි බැවින්, ඇපැල්කරුට එරෙහි ව මෙම ඉඩමෙහි භුක්තිය සඳහා අයිතියක් ප්‍රකාශ කිරීමට ඇය අපොහොසත් ය.

මෙම වගඋත්තරකරු (එනම් නියෝගයෙහි සඳහන් ඉල්ලුම්කාර-පෙත්සම්කරු) වෙත ඉඩමෙහි භුක්තිය පිහිටුවිය යුතු යයි 1963, ජූලි 30 දින දරන, පිස්කල්තැන වෙත කරන නියෝගය මේ නිසා නිෂ්ප්‍රභා කළ යුතු යි.

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ඇපැල්කරුට උසාවියෙහි ආධාරය තව දුරටත් අවශ්‍ය නම්, 54 වැනි වගන්තිය යටතේ භුක්තිය පැවරීමේ නියෝගයක් ඔහුට හිමි වන්නේ ය. එසේ ම එ වැනි නියෝගයක් කළ හොත්, මෙම වගඋත්තරකරු උකස් නඩුවේ තීන්දු ප්‍රකාශයෙන් හා විකුණුම් කිරීමෙන් බැඳී සිටින පාර්ශවකාරයකු යයි යන පදනම මත පිහිටා, දිස්ත්‍රික් උසාවිය ක්‍රියා කළ යුතු යි.

මෙම වගඋත්තරකරු විසින් මෙම ඇපැලෙහි හා 1963 ජූලි 30 දින විභාගයෙහි ගාස්තු ගෙවිය යුතු යි.

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා
මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු අලස් විනිශ්චයකාරතුමා ඉදිරිපිට

සිරිසේන සහ තවත් අය එ. ඩබ්ලිව්. පී. වරකගොඩ, වැල්ලවත්තේ පොලිස් පරීක්ෂක*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 1134–1135/1964—දකුණු කොළඹ මහේස්ත්‍රාත් උසාවියේ අංකය: 29552/බී.

විවාද කොට තීන්දු කළ දිනය : 1965 පෙබරවාරි 16 වෙනි දින දිය.

සුරාබද්ද පණත, 37 වෙනි ඡේදය—විත්තිකරුගේ වාසස්ථානයට පොලිසියේ නිලධාරීන් සෝදිසි වරෙන්තුවක් ලබා නො ගෙන ඇතුල් වීම—ඔවුන් සුරාබද්ද පණතේ 37 වෙනි වගන්තිය යටතේ එසේ කල බව හැඟවීම—විභාගයේ දී එය ඔප්පු නොකිරීම—විත්තිකරු පොලිස් නිලධාරීන්ට ඔවුන්ගේ රාජකාර්‍ය්‍ය ඉෂ්ට කිරීමට බාධා කලා යයි චෝදනා ලැබ වරදකරු වීම—එම තීන්දුව නිත්‍යානුකූල ද?

නීතිවිරෝධි ලෙස නිෂ්පාදනය කළ සුරා විත්තිකරු ලඟ තිබෙන බවට ලැබුන ඔත්තුවක් පිට පොලිස් නිලධාරීන් විසින් විත්තිකරුගේ නිවසට ඇතුල්වී තිබේ. එසේ ඇතුල් වීමට බලය අඩංගු සෝදිසි වරෙන්තුවක් ලබාගෙන නැත. එ වැනි අවස්ථාවක සුරාබද්ද පණතේ 37 වෙනි ඡේදය අනුව සෝදිසි වරෙන්තුවක් ලබා ගැනීමට යාමේ ප්‍රමාදය නිසා වරදකරුට බේරී යාමට ඉඩ ප්‍රශ්න ලැබේ ය යන බැව් හැඟී ගියොත් ඒ බව සටහන්කලාට පසු එ වැනි ඇතුල්වීමකට බලයදී තිබෙන නිසා එසේ සටහන් කර ක්‍රියා කර තිබෙන බව පෙනේ. නමුත් එසේ සටහනක් කල බව නඩු විභාගයේ දී පැමිණිල්ලෙන් ඔප්පු කර නැත.

තීන්දුව : සුරාබද්ද පණතේ 37 වෙනි ඡේදය අනුව එ වැනි අවස්ථාවක සටහනක් කිරීම නියතයෙන් ම උවමනා ය. එසේ කල බව ඔප්පු කර නැති නිසා විත්තිකරුගේ නිවසට පොලිස් නිලධාරීන් ඇතුල් වීම නීතිවිරෝධි ක්‍රියාවක් බැවින් ඔවුන්ට තම රාජකාර්‍ය්‍ය ඉෂ්ට කිරීමට බාධා කළා යයි විත්තිකරුට විරුඩව ඉදිරිපත් කළ චෝදනාවට ඔහු වරදකාරයෙකැයි නිගමනය කල නො හැක.

නීතිඥවරු: එච්. රූපසිංහ, චෝදිත–ඇපැල්කරු වෙනුවෙන්.
රජයේ නීතිඥ යූ. සී. බී. රත්නායක, ඇටෝර්නි–ජනරාල්තුමා වෙනුවෙන්.

ගරු අලස් විනිශ්චයකාරතුමා

පළමුවන, දෙවන, තුන්වන සහ හතරවන චෝදනා යටතේ මෙම නඩුවෙහි චෝදිත ඇපැල්කරුවන් වරද–කරුවන් කිරීම සහ ඔවුනට දෙන ලද දඬුවම මට ඉවත් කිරීමට සිදුවී තිබීම ගැන බලවත් සේ කණගාටු වෙමි. එසේ වීමට ප්‍රධාන හේතුව පැමිණිල්ල මෙහෙයවන ලද නිලධාරීන්ගේ නො සැළකිළිකම ය. චෝදිතයන් නීති–විරෝධි ලෙස නිෂ්පාදනය කරන ලද මත්පැන් තබාගෙන සිටිතැයි යන ආරංචියක් ලැබී පොලිස් නිලධාරීන්

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 52 වෙනි පිට බලනු.

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දෙවන විත්තිකරුගේ නිවසට ඇතුළු වූ බව පොලිසියේ සාක්ෂි වලින් කියැවේ. මේ සඳහා පරීක්ෂා කිරීමේ වරෙන්තුවක් නො ලැබූ පොලිස් නිලධාරිහු සුරාබදු ආඥා පණතේ 37 වන ඡෙදය යටතේ ක්‍රියා කිරීමට සැරසුණ ලෙස පෙනේ. 37 වන ඡෙදයට අනුව යම් අවස්ථාවක දී වරදකරුට බේරී යාමට අවස්ථාවක් නො සැපයෙන අන්දමින් පොලිස් නිලධාරියෙකුට සෝදිසි කිරීමේ වරෙන්තුවක් ලබාගත නොහේ නම් තමාගේ විශ්වාසයට හේතුභූත වූ කරුණු වාර්තාගත කොට කිසියම් ස්ථානයකට ඇතුළුවී එහි තිබෙන යම් කිසි දෙයක් අල්වාගත හැක. මෙහි පොලිස් ආක්‍රමණය භාරව කටයුතු කළ තංගයියා උප-ඉන්ස්පැක්ටර් මහතා තමාගේ පැමිණීම දෙවන විත්තිකරුට පහද දී එම ස්ථානය සෝදිසි කර බැලීමට වුවමනා බව ඔහුට කී බව තමාගේ සාක්ෂියෙන් පැහැදිලි කළේ ය. කෝන්තර අසනු ලැබීමේ දී ඔහු කියා සිටියේ ඔහුට සෝදිසි කිරීමේ වරෙන්තුවක් ලබා ගැනීමට නො හැකි වූ බව සහ එම ස්ථානය ආක්‍රමණය කිරීමට යාමේදී ඔහු විසින් සුරාබදු ආඥා පණතේ 37 වන ඡෙදයට අනුව කටයුතු කළ බවකි. එහෙත් එම ඡෙදයට අනුව තමා කටයුතු කළ බව ඔප්පු කිරීමට කිසිවක් තමා ඉදිරිපත් නො කරන බව ඔහු ප්‍රකාශ කළේ ය. මේ කරුණ තමාට මතක්කරන ලද නමුත් පැමිණිලි පක්ෂයෙන් සුරාබදු ආඥා පණතේ 37 වන ඡෙදයට අවශ්‍ය කරුණු පිළිපැද්ද බවට කිසි ම සාක්ෂියක් ඉදිරිපත් නො කරණ ලදී. එ බැවින් බැලූ බැල්මට දෙවන විත්තිකරු සතු එම ස්ථානයට පොලිසිය ඇතුළු වීම නීතිවිරෝධී ලෙස පෙනේ. මෙසේ සලකන විට පොලිස් නිලධාරීන්ට තම නීත්‍යානුකූල කටයුතු කිරීමට බාධා කිරීමේ සහ ඔවුන්ට ඒ අතරතුර හිංසාපීඩා කිරීමේ චෝදනා තහවුරු කළ නො හැක. මේ නිසා චෝදිතයෝ පළමුවන චෝදනාවේ සිට හතරවන චෝදනාව දක්වා සැම දෙයකට ම නිදහස ලැබීමට සුදුස්සෝ ය. චෝදනාවේ තුන්වන, හතරවන කොටස් වලට හයවන සහ හත්වන චෝදනා ප්‍රතිවිරෝධී ලෙස ගිණිය හැක. හයවන කොටසට අනුව පළමුවන විත්තිකරු පොලිස් කොස්තපල් ගුණසිංහට බරපතල තුවාල කිරීමට වරදකරු කොට බරපතල වැඩ ඇතිව තුන්මසක සිරදඬුවමකට ඔහු භාජන කොට තිබේ. මෙම පොලිස් කොස්තපල්තැනට කරන ලද බරපතල තුවාල කිරීම යකඩ පොල්ලකින් පහරදීම නිසා සිදුවී දැයි යන්න ගැන පැමිණිලි පක්ෂයේ සාක්කි පරස්පර විරෝධි බව කිව යුතු ය. ගුණසිංහ කොස්තපල්තැන තමාගේ සාක්ෂියේ දී තුවාලය සිදුවූයේ යකඩ පොල්ලකින් යයි කියා සිටියේ ය. නමුත් සාක්ෂි ආඥා පණතේ 33 වන ඡෙදය යටතේ සාක්ෂි සටහනක් ඉදිරිපත් කරන ලද දොස්තර මහතාගේ සාක්ෂියෙන් ප්‍රකාශ වී ඇත්තේ දත් වලට සිදු වූ මෙම තුවාලය යකඩ පොලුපහරකින් සිදුවිය නො හැකි බව ය. මේ කරුණු අනුව චෝදනාවේ හයවන කොටසින් වරදට පත්කිරීම දණ්ඩනීති සංග්‍රහයේ 314 වන ඡෙදයට අනුව සුළු තුවාල කිරීමක් හැටියට මම වෙනස් කරමි. චෝදනාවේ හත්වන කොටසින් උප-ඉන්ස්පැක්ටර් තංගයියාට බෝතල වලින් සහ අත් වලින් පහර දීමෙන් දණ්ඩනීති සංග්‍රහයේ 314 වන ඡෙදය යටතේ දෙවන විත්තිකරු වරදකරු කොට තිබේ. එමෙන් ම චෝදනාවේ පස්වන කොටසට අනුව බෝතල් වලින් පහර දීමෙන් පොලිස් කොස්තාපල් ජයතිලකට තුවාල කරණ ලදැ යි පළමුවන විත්තිකරු වරදකරු කොට තිබේ.

නඩුවේ දී ක්‍රියා කර ඇති පිළිවෙලේ අක්‍රමිකතාවය කල්පනාවට ගැනීමෙන් විත්තිකරුවන්ට චෝදනාවේ පළමුවන කොටස සිට හතරවන කොටස දක්වා ඔවුන් වරදකරුවන් කිරීම මම මෙහි දී නිෂ්ප්‍රභා කරමි. ජයතිලක පොලිස් කොස්තාපල්තැනට තුවාල කිරීම නිසා චෝදනාවේ පස්වන කරුණ ම අනුව පළමුවන විත්තිකරු වරදකරු කිරීම නිවැරදි යයි මම පිළිගනිමි. හයවන කොටස ද ගුණසිංහට ඕනෑකමින් ම හිංසා කිරීමක් ලෙස සැලකෙන හැටියට මම වෙනස් කරමි. හයවන කොටසට මහේස්ත්‍රාත්වරයා විසින් පනවන ලද දඬුවම මම ද පනවමි. චෝදනාවේ පස්වන, හයවන කොටස් වලට දෙන ලද දඬුවම එක විට ගෙවී යනු ඇත. දෙවන විත්තිකරු චෝදනාවේ හත්වන කොටසට අනුව වරදකරු කොට තිබීම ද මම පිළිගනිමි. ඔහුට දී ඇති දඬුවම ද නිවැරදි යයි මම නිගමනය කරමි. එම නිසා එහි ප්‍රතිඵලයක් වශයෙන් ඔහුට බරපතල වැඩ ඇති ව තුන්මසක සිර දඬුවමක් නියම වේ.

සමහර චෝදනා උඩ වරදට පත්කිරීම අවලංගු කරන ලදී.

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ගරු වී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

සොලිසිටර් ජනරාල් එ. ඇම්. පී. ධම්සේන*

සු. උ. අංකය: 718/1964—ම. උ. කුරුණෑගල, අංකය: 21137.

වාද කළ දිනය : **1964–10–14.**
තීන්දු කළ දිනය : **1964–10–28.**

සුරාබද්ද ආඥා පණත—ආණ්ඩුවේ ඒජන්ත තැන ගෙන් අවසර පත්‍රයක් නො ලබා අරක්කු විකිණීම නිසා 18 වන ඡේදය යටතේ චෝදනාවක්—චෝදිතයා වෙත අවසර පත්‍රයක් නැතැයි කියන කිසිම සාක්ෂියක් පැමිණිල්ලෙන් ඉදිරිපත් නොවූ හේතුවෙන් පැමිණිල්ලේ සාක්ෂි නිමාවෙන් පසු චෝදිතයාට විරුඬව චෝදනාව නිෂ්ප්‍රභා කිරීම—මෙම සාක්ෂි ඉදිරිපත් කිරීමේ කාර්‍ය්‍යභාරය ඇත්තේ පැමිණිලි පක්ෂය පිට ද?

තීන්දුව : ආණ්ඩුවේ ඒජන්ත තැන ගෙන් අවසර පත්‍රයක් නො ලබා අරක්කු විකිණීම පිළිබඳව සුරාබද්ද ආඥාපණතේ 18 වන ඡේදය යටතේ චෝදනාවක් ඉදිරිපත් කල විටක එ බඳු බලපත්‍රයක් තමා වෙත තිබුනේ යයි ඔප්පු කිරීමේ කාර්‍ය්‍යභාරය ඇත්තේ චෝදිතයා පිට ම ය.

සඳහන් කළ නඩු: **පිටිගල් කෝරලේ මුදලිතුමා එ. කිරිබණ්ඩා, (1909) 12 න.නී. වා. 304; 5 ඒ. සී. ආර්. 80.**
මහ රජතුමා එ. ඔලිවර්, (1943) සමස්ත එංගලන්ත වාර්තා 800.
ජෝන් එ. හම්ප්‍රිස්, (1955) 1 ස.එ.වා. 793; 1 (1955) 1 සතිපතා නීති වාර්තා 325.

නීතිඥවරු : **වී. ඇස්. ඒ. පුල්ලෙනායගම්, ආණ්ඩුවේ අධිනීතිඥතැන, ඇපැල්කරු වෙනුවෙන්.**
වගඋත්තරකාර-විත්තිකරු වෙනුවෙන් කිසිවෙක් පෙනී සිටියේ නැත.

ගරු වී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

දිසාපති තැන ගෙන් අවසර පත්‍රයක් නො ලබා සුරාබද්ද ආඥපණතේ 18 වන ඡේදය උල්ලංඝනය කරමින් අරක්කු විකුණන ලදැයි යන චෝදනාව මහේස්ත්‍රාත් උසාවියේ දී චෝදිත වගඋත්තරකරුට විරුඬව ඉදිරිපත් කරණ ලදී. පැමිණිලි පක්ෂයේ සාක්ෂි ඇසීමෙන් පසු නිදහසට කරුණු කීමට යයි චෝදිතයාට නොකියා ම උගත් මහේස්ත්‍රාත්වරයා චෝදිතයාට විරුඬව ඇති චෝදනාව නිෂ්ප්‍රභා වන ලෙස තීන්දුව දුන්නේ ය. එම තීන්දුවේ මහේස්ත්‍රාත්වරයා විසින් පහත සඳහන් පරිදි සඳහන් කර ඇත.

"අවසර පත්‍රයක් නොමැතිව අරක්කු විකිණීම නිසා විත්තිකරුට චෝදනා ඉදිරිපත් කොට තිබේ. සාක්ෂිකරුවන්ගේ සාක්ෂිවල කිසිම තැනක චෝදිතයාට බල පත්‍රයක් නොමැති බවට සාක්ෂියක් කියවී නැත. චෝදිතයා ළඟ අවසර පත්‍රයක් තිබිණි නම් ඔහු නිදහස් කිරීමට සුදුසු තත්ත්වයක සිටින කෙනෙකි. තමාගේ නඩුවෙහි ශක්තිය ම පැමිණිලි පක්ෂයේ ප්‍රතිෂ්ඨාව විය යුතු ය.

චෝදිතයාට අවසර පත්‍රයක් නැතැයි කිසිම සාක්ෂියක් ඉදිරිපත් කිරීමට අතපසුවීම නිසා අවසර පත්‍රයක් තිබේයයි ඔප්පු කිරීමේ කාර්‍ය්‍යභාරය චෝදිතයාට පැවරෙන්නේ නැත. චෝදනාවේ සෑම සැලකිය යුතු කොටසක් ම ඔප්පු කිරීම පැමිණිලි පක්ෂය සතු ය. පැමිණිලි පක්ෂයේ එකම පදනම චෝදිතයා වෙත අවසර පත්‍රයක් නො මැති බව ය."

මෙම නඩුවිභාගයේ සටහන් සමගම මහේස්ත්‍රාත්වරයාගේ නියෝගය අවලෝකනය කරණ විට ඉදිරිපත් කිරීමට අදහස් කළ සියලු ම සාක්ෂි පැමිණිලි පක්ෂය විසින් ඉදිරිපත් කරණ ලද බව පැහැදිලි ව පෙනීයේ. වෙන වචන වලින් කියනොත් පැමිණිලි පක්ෂය තම සාක්ෂි ඉදිරිපත් කිරීම නිමාවට ගෙන ගොස් තිබේ. මෙසේ කරුණු ඇතිව තිබිය දී මහේස්ත්‍රාත්වරයා චෝදිතයා නිදහස් කිරීමට අදහස් කරන්නට ඇත. නමුත් ඔහු එය එසේ ප්‍රකාශ නො කොට චෝදිතයා කෙරෙහි එල්ල වූ චෝදනාව නිෂ්ප්‍රභා කරණ ලදැයි කීම කණගාටුවට කරුණකි.

කෙසේ වෙතත් මෙසේ නිදහස් කිරීමේ නියෝගය දෙසට හැරී බලත්ම සාක්ෂි ඔප්පු කිරීමේ කාර්‍ය්‍යභාරය පිළිබඳ ප්‍රශ්නයේ දී මහේස්ත්‍රාත්වරයා ගරුක ලෙස වැරදි අවබෝධයකින් ක්‍රියා කර ඇති බව පැහැදිලි ව පෙනේ. මහේස්ත්‍රාත් උසාවි මගින් විසඳීමට තිබෙන බොහෝ නඩුවල මෙම ප්‍රශ්නය දිනපතාම මතුවන්නකි. ඇත්ත වශයෙන් ම දන් ඉතා හොඳින් මෙම කරුණ

* **ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 45 වෙනි පිට බලනු.**

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විනිශ්චිත වී ස්ථාපිත ව පවත්නා (well-settled) මෙම කරුණ පිළිබඳ ව නීති තත්ත්වය කෘතහස්තභාවයක් (experienced) ඇති මහේස්ත්‍රාත්වරයෙකු නො දැනීම පුදුමයට කාරණයෙකි.

සාක්ෂි ආඥා පණතේ 9 වන පරිච්ඡේදය ම මෙම අභියාචනයෙහි (ඇපැලෙහි) උද්ගත වී ඇති ප්‍රශ්නය විසඳා දෙයි. යම් කිසි කරුණක් යම් කිසි පුද්ගලයකුගේ විශේෂ දැනීමට ගොදුරුවන්නක් වී ඇති අවස්ථාවක එම කරුණ ඔප්පු කිරීමේ කාර්යභාරය ඔහු පිට ම පැවරෙන බව එහි 106 වන ඡේදයෙන් පැණ වේ. එම ඡේදයෙහි "බී" දරණ නිර්දේශය මෙම මහේස්ත්‍රාත්වරයා ඉදිරියට මෙහිදී විසඳීම පිණිස ආ කරුණුවල තත්ත්වයට බෙහෙවින් සමානය. "ඒ" නමැත්තාට ප්‍රවේශ පත්‍රයක් නොමැතිව දුම්රියෙන් ගමන් කිරීමේ චෝදනාවට නඩු දැමූ විට ප්‍රවේශ පත්‍රයක් තමා වෙත ඇති බව ඔප්පු කිරීමේ කාර්යභාරය ඔහු සතු බව එහි සඳහන් ව තිබේ. **පිටිගල්කෝරලේ මුදලිතුමාට එරෙහිව කිරිබණ්ඩා,** (1909) 12 න. නී. වා. 304, යන නඩුවේ දී මෙයට සමාන කරුණක් මීට අවුරුදු 50 කට පෙර විනිශ්චයකාර-වරු තිදෙනෙකු ගෙන් යුක්ත මණ්ඩලයක් විසින් අපේ අධිකරණයේ දී විනිශ්චය කරණ ලදී. කැලෑ ආඥා පණතේ 20 වන ඡේදය යටතේ නඩු දමන ලද අවස්ථාවක තීන්දුවේ සඳහන් ව එහි ඇත්තේ එම වරද කළා යයි කියන කැලෑ ප්‍රදේශය "විශේෂයෙන් වෙන් කර තබන ලද හෝ ග්‍රාමීය කැලෑ තීරයක හෝ නොවන බව ඔප්පු කිරීමේ කාර්යභාරය පැවරී ඇත්තේ චෝදිතයා පිට බව ය. තිදෙනෙකුගෙන් සංයුක්ත එම විනිශ්චය මණ්ඩලය තීරණය කළේ "විශේෂයෙන් වෙන් කොට තබන ලද හෝ ග්‍රාමීය කැලෑ තීරයක ඇතුළත් නොවන" යන වචන සාක්ෂි ආඥා පණතේ 105 වන ඡේදයේ තේරුම සමග සසඳා බලන විට ඒවා ව්‍යතිරේකයක් (exception) හැටියට සැලකිය යුතු බව ය. අග්‍රවිනිශ්චයකාර හචින්සන් මහතාගේ ප්‍රකාශය වූයේ මේ වචන වලින් කෙරෙන්නේ "විශේෂයෙන් වෙන් කොට තබන ලද හෝ ග්‍රාමීය කැලෑ තීරයක ඇතුළත් නොවේ නම්" යන්න වෙන විදියකින් ප්‍රකාශ කිරීමයි. ග්‍රෙනියර් වැඩ බලන විනිශ්චයකාර මහතා කීයේ "යම් කිසි පුද්ගලයෙකු බිම කොටා ඇති බව හෝ එළිපහළි කර ඇති බව හෝ යම් කැලයක් පුලුස්සා ඇති බව හෝ ඔප්පු කළහොත් ඔහු කළ ඒ ක්‍රියාව යුක්තියුක්ත යයි ද ඒ ගැන ඔහුට විරුද්ධව පියවරක් ගත නො හැකි යයි ද පෙන්වීමට එම භූමිය වෙන් කොට තබන ලද හෝ ග්‍රාමීය කැලෑ තීරයකට ඇතුළත් වන ලද කොටසක් යයි ඔප්පු කිරීමේ කාර්යභාරය ඒ පුද්ගලයා පිට පැහැ-දිලිව ම පැවරී ඇති දෙයක් බව ය. ඒ සඳහා ඔහුට බල පත්‍රයක් ඉදිරිපත් කළ හැකි නම්, එසේ නැතහොත් එය ඔහුගේ පුද්ගලික ඉඩමකැයි ඔප්පු කළ හැකි නම් නඩුවේ පැමිණිල්ල එ තැනින් ම නිමවේ. එ බඳු ස්ථාවර (positive) සාක්ෂි ඉදිරිපත් කිරීමේ හැකියාව අනිවාර්යයෙන් ම ඇත්තේ ඔහු වෙත ය. එ බැවින් පැමිණිලි පක්ෂයට නිෂේධයක් (negative) ඔප්පු කිරීමට යයි නො කියා එය තමා විසින් ම ඉදිරිපත් කිරීමට ඔහුට පුළුවන්කම තිබිය යුතු ය. සාක්ෂි පණතේ 105 වන ඡේදයෙහි ඇති වචන වලින් පෙනී යන්නේ නීතිය ක්‍රියාවේ යෙදවීමෙන් තමා පිට වැටෙන ආදීනවයන් ගෙන් මිදීමට උපකාරී වන කරුණු ඇති බව පෙන්වීම තමා පිට පැවරී ඇති කාර්යභාරය වේ" යනු යි.

දැනට මා ඉදිරියට පැමිණ ඇති මේ ප්‍රශ්නය අපේ සාක්ෂි ආඥා පණත ගැන සඳහන් කිරීමෙන් ම විසඳිය හැකි වුව ද, ඉංග්‍රීසි සාක්ෂි පිළිබඳ ව ඇති නීතියෙහි පවා, සාමාන්‍ය වශයෙන් බලන කල, අපරාධ චෝද-නාවක් ඔප්පු කිරීමේ කාර්යභාරය පැමිණිලි පක්ෂය මත රඳා තිබෙන අතර සමහර කරුණු චෝදිතයාගේ දැනීමට ම සීමා වී ඇත් නම් ඒ කරුණු ගැන බැලූ බැල්මට පිළිගත හැකි සාක්ෂිවත් පැමිණිලි පක්ෂය විසින් ඉදිරිපත් කිරීම අනවශ්‍ය බව සලකා ගත හැකි වීම අප විසින් සැලකිල්ල යොමු කළ යුතු කරුණක් බව කිය යුතු ය. **මහරජතුමා එ. ඔලිවර්,** (1943) 2 සමස්ත එංගලන්ත වාර්තා 800, නමැති නඩුවේදී ක්‍රියා කිරීමට සිදුවුනේ අවශ්‍ය අවසර පත්‍රය නොමැතිව තොග වෙළෙන්දෙකු වශයෙන් සීනි විකුණූ මිනිසකු පිළිබඳව ය. මෙහි දී ඒ රටේ ආරක්ෂක (සාමාන්‍ය) රෙගුලාසි වලින් පැවරෙන බලතල යටතේ නිකුත් කරණ ලද සීනි (පාලක) නියෝගයක් කඩකිරීම මේ නඩුවේ සම්භවය විය. එංගලන්තයේ අපරාධ ඇපැල් උසාවිය චෝදිතයා වෙත අවසර පත්‍රයක් නො මැති බව බැලූ බැල්මට පෙනෙන සාක්ෂි වුව ද ඉදිරිපත් කිරීම අනවශ්‍ය යයි නිගමනය කෙළේ ය. මහරජතුමා එ. ඔලිවර් නමැති (ඉහත සඳහන්) නඩු තීන්දුව, ක්වීන්ස් බෙන්ච් අධිකරණ අංශයෙහි (Queen's Bench Division) විස-දුනු **ජෝන් එ. හම්ෆ්‍රිස්,** (1955) 1 සමස්ත එංගලන්ත වාර්තා 793, නමැති නඩුවෙහි ද අනුගමනය කරණ ලද බව පෙනේ. සඳුව මෙහි සඳහන් වුනු නඩුවෙහි දී එරට වර්ෂ 1930 මාර්ග රථ වාහන (Road Traffic Act of 1930) පණතේ 4 (1) වන ඡේදයෙන් පැණවෙන කිසි යම් පුද්ගලයකු විසින් බල පත්‍රයක් නො ලබා, මාර්ගයෙහි මෝටෝ රථ වාහනයක් නො පැදවිය යුතු ය යන විධානය උල්ලංඝනය කරණ ලදැයි, චෝදනා ඉදිරිපත් වූ විට විත්තිකරුට බල පත්‍රයක් තිබුණු බව ඔප්පු කිරීමේ කාර්යභාරය ඔහු පිට පැවරී ඇත්තේ එය විශේෂයෙන් ම ඔහුගේ දැනීමට ගෝචර වන කරුණක් නිසා යයි ද ඔහු විසින් තමාට බල පත්‍රයක් තිබේය යන එම කරුණ ඔප්පු නො කළ කලක විනිශ්චයකාරවරු ඒ පුද්ගලයා වරදකරු කළ යුතුව තිබුනේ යයි තීන්දු කරණ ලදී. එංගලන්තයේ වේවා ලංකාවේ වේවා තමාගේ දක්ෂතාවය පිළිබඳ සහතික පත්‍රයක් නොමැතිව මහා මාර්ගයක මෝටෝ රියක් එළවූ අවස්ථාවකින් පැමිණිලි පක්ෂයට ආරම්භක ස්ථාන විශාල සංඛ්‍යාවක්—එනම් දක්ෂතාවය පිළිබඳ සහතික පත්‍ර ප්‍රදානක්ෂම සකල ස්ථානයකින් ම—සාක්ෂි කැඳවීමට සිදුවේ නම් එය විඳ දරාගත නො හැකි තත්ත්වයක් බව කීමට සිදුවේ. මෙම ඇපැල් පෙත්සමට හේතුභූත වූ නඩු තීන්දුව දුන් මහේස්ත්‍රාත්වරයාගේ මනයෙහි ඇති අසාධාරණත්වය පෙන්වීමට වෙනත් නිදර්ශන ඉමහත් සංඛ්‍යාවක් පෙන් විය හැක.

මා විසින් ඉහත දැක් වූ හේතුන් නිසා මෙම ඇපැලට ඉඩ දී චෝදිතයා නිදහස් කරමින් වර්ෂ 1964 අප්‍රියෙල් 8 වෙනි දින දී ඇති තීන්දුවට මම මෙසේ ඉවත හෙලමි. කරුණු සාමාන්‍ය ලෙස පැවතී යන අවස්ථාවක මෙම

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නඩුවේ විත්තිකරුගේ නිදහසට කරුණු ඇසීම පිණිසත් ඉන්පසු ඊට අනුව නීතිප්‍රකාර ක්‍රියා කරණු පිණිසත් එම මහේස්ත්‍රාත්වරයාට ම යැවීමට හැකි විය හැකි වුවත් ඇපැල් පෙත්සමට භාජන වූ මෙම තීන්දුව දුන් මහේස්ත්‍රාත්වරයා දුන් අන් තැනකට මාරුකර යවා ඇති නිසා එම නඩුව තව දුරටත් ඇසීමට ඔහුට උපදෙස් දීම අවස්ථානුකූලයයි නොසිතේ. මෙම විශේෂ අවස්ථා-වෙහි ගත යුතු සුදුසු පිළිවෙල මෙම චෝදිතයාගේ නඩුව ඇසීමට දැනට සිටින කුරුණෑගල මහේස්ත්‍රාත්වරයාට උපදෙස් දීම යයි සිතෙන නිසා මම එසේ උපදෙස් දෙමි.

ඇපැලට ඉඩ දී
නැවත විභාගයට යවන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා සහ ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

ඩී. පී. දහනායක සහ තව අයෙකු එ. ඩී. ඩබ්ලිව්. අලගකෝන් සහ තවත් අය*

සු. උ. නො. 14/64—මාතර දි. උ. නො. 20832/පී.

වාද කළේ සහ තීන්දු කළේ : 1965 ජුලි 2 වන දින.

බෙදුම් නඩු ආඥා පණත (1938 ලංකා නීති ප්‍රඥප්ති සංග්‍රහයේ 56 වන අධිකාරය), 5 වන ඡේදය—ඉඩමක් බෙදීම සඳහා මිනින්දෝරුවෙකුට කොමිසමක් නිකුත් කිරීම—5 වැනි ඡේදයේ අතුරු විධාන යටතේ දින 30 ක් කල් දීමට නියමවීම—එම විධානය අනුගමනය කිරීම අවශ්‍යම ද—එය අනුගමනය නො කිරීමේ ප්‍රතිඵලය.

මේ නඩුවේ බෙදුම් තීන්දුව ප්‍රකාශයට පත් කිරීමෙන් පසුව බෙදුම් සැලැස්මක් සකස් කරන ලෙස බෙදුම් නඩු ආඥා පණතේ 5 වැනි ඡේදය යටතේ මිනින්දෝරුවකුට කොමිසමක් නිකුත් කරන ලදී. සැලැස්ම සකස් කළ යුතු කොමසාරිස්වරයා ඉඩම බෙදීමට ප්‍රථමයෙන් දින 30 ක් කල් දිය යුතු බව 5 වැනි ඡේදයේ අතුරු විධානය යටතේ නියම වී ඇත. එසේ කල් දී නැති බව නඩුවේ සටහන් වලින් හොඳින් ම පැහැදිලි ය. කොමසාරිස්වරයා විසින් සකස් කරන ලද සැලැස්ම විභාග කිරීමෙන් පසු දිස්ත්‍රික් නඩුකාරතුමා කළ නියෝගයට විරුඩව මේ ඇපැල ඉදිරිපත් කර තිබේ.

කල් දීම පිළිබඳ විධානය අනුගමනය කිරීම අත්‍යාවශ්‍ය බව ඇපැල්කරුවන් වෙනුවෙන් ප්‍රකාශ කරන ලදී. මේ ප්‍රශ්නය උගත් දිස්ත්‍රික් නඩුකාරතුමා ඉදිරියේ පැවැත්වුන විභාගයේ දී මතු නො කරන ලද අතර එය පළමු වරට මතු කරන ලද්දේ ඇපැලේ දී ය.

තීන්දුව: (1) බෙදුම් නඩු ආඥා පණතේ 5 වැනි ඡේදයේ අතුරු විධානයේ විධාන අනුගමනය නො කිරීම නිසා කොමසාරිස්වරයා සවකීය කොමිසම නීති ප්‍රකාර ක්‍රියාවට පත් කර නැත.

(2) එම නිසා ඇපැලට හේතු වූ නියෝගය ඉවත හෙළා 5 වැනි ඡේදය යටතේ අළුත් කොමිසමක් නිකුත් කළ යුතු ය.

නීතිඥවරු: ඇන්. ඇස්. ඒ. ගුණතිලක මහතා, පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

එච්. වනිගතුංග මහතා, එච්. ඇල්. කරවිට මහතා සමග, 37 වැනි සිට 43 වැනි විත්තිකාර-වගඋත්තර-කරුවන් වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා

මෙ බෙදුම් නඩුව පවරණ ලද්දේ දැන් අවලංගු කර ඇති බෙදුම් නඩු ආඥා පණත යටතේ ය. බෙදුම් තීන්දුව ප්‍රකාශයට පත් කිරීමෙන් පසු ව ඉඩම බෙදන ලෙස නියම කරන සහ අවසර දෙන කොමිසමක් මාතර බලය ලත් මිනින්දෝරු ඊ. ඩබ්ලිව්. ජයසූරිය මහතා වෙත එම ආඥා පණතේ 5 වැනි ඡේදය යටතේ 1962.2.26 දින උසාවිය විසින් නිකුත් කරන ලදී. ඉඩම බෙදීමට දවස් 30 ට ප්‍රථමයෙන්, බෙදීමට නියමිත ඉඩමේ ප්‍රමුඛ ස්ථානයක ඉඩම බෙදීමට නියමිත දිනය සඳහන් ලිඛිත දැන්-වීමක් සවිකරන ලෙස ද, ඉඩම පිහිටි ස්ථානයේ හෝ ගමේ අඩබෙර ගසා ඒ බව වැඩිදුරටත් දැනුම් දෙන ලෙස ද, ඒ බව මහත් ප්‍රසිඩියට පැමිණි විය හැකියැ යි හොඳා-කාරයෙන් හැඟෙන වෙනත් කටයුතු කරන ලෙස ද ඉහත සඳහන් 5 වැනි ඡේදයේ අතුරු විධානයෙන් කොමසාරිස්වරයාට නියම ව තිබේ.

සවකීය කොමිසම නීතිප්‍රකාර ක්‍රියාවට පත් කිරීමට නම් කොමසාරිස්වරයා විසින් අනුගමණය කිරීමට අවශ්‍යම විධානයක් ඉහත සඳහන් අතුරු විධානයේ ඇතුලත් බව, ඇපැල්කරුවන් වෙනුවෙන් පෙනී සිටි ඇන්. ඇස්. ඒ. ගුණතිලක මහතා වාද කළේ ය. කොම-සාරිස්වරයා විසින් ඉදිරිපත් කරන ලද බෙදුම් සැලැස්ම පිළිගැනීමට හෝ සංශෝධනය කිරීමට හෝ පවත්වන ලද විභාගයේ දී මේ ප්‍රශ්නය මතු නො කරන ලද නමුත් කොමසාරිස්වරයා නියමිත නීතිවිධිවිධාන අනුගමණයකර නැතැ යි ගුණතිලක මහතා කළ ප්‍රකාශය හරි බව මේ නඩුවේ සටහන් පරීක්ෂා කිරීමේ දී පෙනී යයි. කලින් කී අන්දමට කොමිසම 1962.2.26 දින නිකුත් කර ඇති අතර බෙදුම් සැලැස්ම සකස් කිරීමට ඔහු ඉඩමට පැමිණි-යේ 1962.3.16 දින ය. ඔහුගේ නො. 75 දරණ සැලැස්ම 1962.3.25 දින සහිත ය. එම නිසා, කොමසාරිස්වරයා ඉඩමට පැමිණ ඔහුගේ සැලැස්ම සකස් කිරීමට ප්‍රථම-

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 69 වෙනි පිට බලනු.

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යෙන් කොමිසම නිකුත් කළ දිනයේ සිට දින **30** ක් ගතවිය නො හැකි ය. ඉහත සඳහන් ආඥා පණතේ 5 වැනි ඡේදයේ අතුරු විධානයේ විධාන අනුගමනය කිරීමට කොමසාරිස්වරයා අසමත් වී ඇති බව ද ඍවකීය කොමිසම ඔහු නීති ප්‍රකාර ක්‍රියාවට පත්කර නැති බව ද මම තීන්දු කරමි.

ඉහත සඳහන් හේතූන් නිසා ඇපැලට හේතු වූ නියෝගය ඉවත හෙළන අතර ඉහත සඳහන් 5 වැනි ඡේදය යටතේ අළුත් කොමිසමක් නිකුත් කරන ලෙස ද අළුත් කොමිසම ලබාගන්න කොමසාරිස්වරයා ඍවකීය සැලැස්ම සකස් කිරීමේ දී පුළුවන්කමක් ඇත් නම් සියළුම හවුල්කරුවන්ට පාරට යාබද කොටස් දීමේ අවශ්‍යතාවය සැලකිය යුතු බව ද මම නියම කරමි.

නීතියේ විධිවිධාන අනුව කටයුතු කිරීමට ඉහත සඳහන් ලෙස අසමත් වී ඇත්තේ මේ ඇපැලේ වග-උත්තරකරුවන්ගේ ප්‍රමාද දෝෂයකින් හෝ නොසැලකිල්ලෙන් හෝ නොවන හෙයින් ඇපැල්කරුවන්ට ගාස්තු කිසිවක් දිය යුතු නැතැයි මම කල්පනා කරමි.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඇපැලට ඉඩදෙන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා සහ අලස් විනිශ්චයකාරතුමා ඉදිරිපිටදී ය.

විජේසිංහ එ. මැණිකා සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ නො: 522/1963—දිස්ත්‍රික් උසාවිය (එෆ්), මහනුවර නො: එල්/5704.

විවාද කොට තීන්දු කළ දිනය : අප්‍රේල් 2, 1963.

සිවිල් නඩු සංවිධානය—නඩු විභාග දිනයේ පැමිණිලිකරු පෙනී නො සිටීම—ඔහුගේ පෙරකදෝරුතැන තමාට දුන් පෙරකලාසිය අවලංගු කිරීමට යාච්ඤා කර තිබෙන බව දැන්වීම—ඔහු පැමිණිලිකරු වෙනුවෙන් පෙනී නො සිටින බව හා නඩුව පිළිබඳ උපදෙස් නො ලත් බව උසාවියට නො දැන්වීම—පැමිණිලිකරු උසාවියේ පෙනී නොසිටියා යැයි කියා "නයිසයි" තීන්දු ප්‍රකාශයක් කිරීම—එම ප්‍රකාශය නීත්‍යානුකූල ද?

තීන්දුව : නඩු දිනයක දී උසාවිය ඉදිරියෙහි පෙනී නො සිටි පැමිණිලිකරුවෙකුගේ පෙරකදෝරුතැන විසින් තමාට පැමිණිලිකරුගෙන් ලැබුන පෙරකලාසිය අවලංගු කිරීමට යාච්ඤාකර තිබෙන බව පමණක් උසාවියට දැන්වීමෙන් එම පැමිණිලිකරු වෙනුවෙන් කිසිවෙක් පෙනී නො සිටියා ය යන නිගමනය සිට ඔහුට විරුඩ "නයිසයි" තීන්දු ප්‍රකාශයක් කළ නොහැක—එසේ කල හැක්කේ ඒ පෙරකදෝරුතැන විසින් තම පැමිණිලිකරු වෙනුවෙන් නො පෙනෙන බව හෝ පැමිණිලිකරුගෙන් නඩුව විභාගය සඳහා කිසි උපදේශයක් නො ලැබුන බව දැන්වීමෙනි.

නීතිඥවරු: ඇන්. ආර්. වීරසූරිය (කණිෂ්ඨ) මහතා, 10 වෙනි වගඋත්තරකාර–ඇපැල්කරු වෙනුවෙන්.
ජේ. ඩබ්ලිව්. සුබසිංහ මහතා, පැමිණිලිකාර–ඇපැල්කරු වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා

මෙම නඩුවෙහි පැමිණිලිකරුවා නඩු දිනය වූ 1963 සැප්තැම්බර මස 12 වෙනි දින උසාවියට පැමිණියේ නැත. නමුත් ඔහුගේ නීතිඥයා වූ මුස්තාපා මහතා පැමිණ පැමිණිලිකරු විසින් තමාට දුන් පෙරකලාසිය අවලංගු කිරීමට වර්ෂ 1963 සැප්තැම්බර මස 9 වෙනි දින තමා විසින් උසාවියට ඉල්ලීමක් කරන ලද බී කියා සිටියේ ය. මුස්තාපා මහතා පැමිණිලිකරු වෙනුවෙන් පෙනී නො සිටින බව කීවේ නැත. එමෙන් ම ඔහුට පැමිණිලිකරුගෙන් උපදෙස් නො ලැබුණු බවක් ද ඔහු කියා නැත. මෙම කරුණු උඩ උගත් විනිශ්චයකාරතුමා පැමිණිලිකරු උසාවියට නොපැමිණියේයයන නිගමනයට සහ ඔහු වෙනුවෙන් නීතිඥයෙකු පෙනී නො සිටියේ ය යන නිගමනයට බැස ඒ අනුව පැමිණිලිකරුට විරුඩ ව "නයිසයි" තීන්දු ප්‍රකාශයක් වාර්තාගත කළේය. මින්පසු මෙම ප්‍රකාශය කළ දින සිට දින 14 ක් ගෙවීමට මත්තෙන් එම "නයිසයි" තීන්දු ප්‍රකාශය ඉවත් කරන ලෙස පැමිණිලිකරු වෙනුවෙන් උසාවියට ඉල්ලීමක් ඉදිරිපත් කරන ලදී. නමුත් එකී "නයිසයි" ප්‍රකාශය ඉවත් කිරීම ප්‍රතික්ෂේප කරමින් උගත් විනිශ්චයකාරතුමා නියෝගයක් දී තිබේ. පැමිණිලිකරු එම නියෝගයට විරුඩව අභියාචනයක් ඉදිරිපත් කොට තිබේ.

මාගේ අදහසේ හැටියට වර්ෂ 1963 සැප්තැම්බර 12 වෙනි දින නඩු පොතේ පෙරකලාසියක් අමුනා තිබූ මුස්තාපා මහතා පැමිණිලිකරු වෙනුවෙන් පෙනිසිටියේය. එපමණක් නොව තමා පැමිණිලිකරු වෙනුවෙන් පෙනී නොසිටින බව හෝ පැමිණිලිකරුගෙන් තමාට උපදෙස් නොලැබුණු බව හෝ මුස්තාපා මහතා උසාවියට සැලකර නැත. මේ නිසා පැමිණිලිකරුට විරුඩව "නයිසයි" තීන්දු ප්‍රකාශයක්වාර්තාගත කළ නොහැක. මෙම නඩුවේ වාර්තාගත කොට ඇති එම නියෝගය ඉවත ලන මම මහනුවර දිස්ත්‍රික් උසාවියට මෙම නඩුව නැවතත් විභාග කිරීමට උපදෙස් දෙමි.

මෙම නඩුවේ වගඋත්තරකරු පැමිණ නැති නිසාත් නඩුව විවාදයට භාජන නො වුනු නිසාත් එහි නඩු ගාස්තුව ගැන මම කිසිම නියෝගයක් නො කරමි.

ගරු අලස් විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඇපැලට ඉඩ දී
නැවත විභාගයට යවන ලදී.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 72 වෙනි පිට බලනු.

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ගරු ශ්‍රී ස්කන්ධ රාජා සහ ගරු සිරිමාන විනිශ්චයකාරතුමන් ඉදිරිපිට

ධම්මින්ද නායක ස්ථවිර එ. ඇප්. ජේ. ඩයස්*

සංශෝධන ඉල්ලීම් අංකය:— 476/64 දි. උ. කොළඹ, 781/Z

වාද කළ සහ තීන්දු කළ දිනය : **1964–12–16.**
කරුණු සහිත තීන්දු ප්‍රකාශය : **1965–1–13.**

මුද්දර ආඥා පණත—II වෙනි කොටසේ නියමය පරිදි මුද්දර ගසා සහතික කළ නිති වාර්තා පිටපත් සුප්‍රීම් උසාවියට ඉදිරිපත් කරන විට ඒ සහතික පිටපත් වලට නැවතත් මුද්දර ගැසිය යුතු ද?—එම ආඥා පණතේ I වෙනි කොටස එහි II වෙනි කොටසේ නියෝගයට බලපාන්ද?— සිවිල් නඩු විධාන සංග්‍රහය, 205 වෙනි ඡේදය.

තීන්දුව : (1) මුද්දර ආඥා පණතේ I වෙනි කොටසේ අංක 24 වෙනි නියෝගය එම ආඥා පණතේ II වෙනි කොටසේ විශේෂයෙන් සඳහන් ව ඇති උසාවි වල නඩු වාර්තා සහතික පිටපත් වලට සම්බන්ධයක් නැති බව පැහැදිලි ය.

(2) හරියාකාර මුද්දර ගැසූ ලියවිල්ලක් උසාවියකට ඉදිරිපත් කරන විටක දී ඊට නැවත වරක් මුද්දර ගාස්තු ගෙවිය යුතු නොවේ.

නීතිඥවරු : රාජනීතිඥ එච්. වී. පෙරේරා, මොරින් සෙනෙවිරත්න මෙනෙවිය සමග, පෙත්සම්කරු වෙනුවෙන්.

ජේ. ජී. ටී. වීරරත්න, රජයේ අධිනීතිඥ තැන, ඒ. ඒ. ද සිල්වා, රජයේ නීතිඥතැන සමග, අධිකරණ සහාය වශයෙන්.

ගරු සිරිමාන විනිශ්චයකාරතුමා

මේ සංශෝධන ඉල්ලීමේ පෙත්සම්කරු විසින් මුද්දර ආඥා පණතේ, (247 වෙනි අධිකාරය) 11 වෙනි කොටසේ අධංගු නඩුවක එහි වටිනාකම අනුව වූ වශයට නියම මුද්දර ගැසූ දිස්ත්‍රික් උසාවියක වාර්තා වල එහි ලේකම්තැන විසින් සහතික කරන ලද පිටපත් මෙම ඉල්ලීමට අමුනා ඇත.

සිවිල් නඩු විධාන සංග්‍රහයේ 205 වෙනි ඡේදයෙහි මෙසේ දක්වා ඇත:—

අධිකරණය විසින් කලින් කල නිශ්චය කරන අන්දමේ ගාස්තු ගෙවීමෙන්, යම් නඩු විභාගයක වාර්තාවක හෝ ඉන් කොටසක සහතික පිටපත් ඉල්ලා සිටින හා ඊට අවශ්‍ය මුද්දර සපයන සෑම කෙනෙකුට ම අධිකරණයේ ලේකම් විසින් හෝ ප්‍රධාන ලිපිකරු විසින් එය සියලු විට සැපයිය යුතුය; නැතහොත් ඒ බඳු තැනැත්තකු විසින් ඒ බඳු ඉල්ලීමක් කොට ඊට අවශ්‍ය මුද්දර ද සපයමින් ඔහු විසින් පිළියෙළ කර ඇති පිටපත් ඉදිරිපත් කළ හොත් එම පිටපත් පරික්ෂා කොට එහි නිවැරදිභාව පිළිබඳ ව සහතික කළ යුතු ය.

ශ්‍රේෂ්ඨාධිකරණයේ රෙජිස්ට්‍රාර්තැන විසින් පෙත්සම්කරු විසින් ඉදිරිපත් කරණ ලද ඉහත කී පිටපත් හරියාකාර මුද්දර ගැසී නොමැති යයි කියා ප්‍රතික්ෂේප කර තිබේ. ඔහුගේ තර්කය කෙටියෙන් මෙසේ ය. රාජ්‍ය නිලධාරිවරයෙක් නිකුත් කරණ ලද ලියවිලි වල සහතික පිටපත් මුද්දර ආඥා පණතේ ''ඒ'' උපලේඛනයේ 1 වෙනි කොටසේ 24 වෙනි අංකයට අයත් වන නිසා ඒ අනුව පිටපතකට රුපියලක මුද්දර ගාස්තුවක් ගෙවිය යුතු බව ය. අනතුරුව ඔහු කියා සිටින්නේ නඩු විභාගයක දී එම සහතික පිටපත් ඉදිරිපත් කරණ විටක දී ඒවා ඉදිරිපත් කරන උසාවියට සහ නඩුවේ වටිනාකමේ වශයට නියම මුද්දරත් මුද්දර ආඥා පණතේ II වෙනි කොටස යටතේ නැවත ගෙවිය යුතු බව යි. ඉල්ලුම්කරුගේ නීතිඥතැන විසින් රෙජිස්ට්‍රාර්වරයාගේ ඉහත සඳහන් මතය වැරදි යයි විරුද්ධවෙමින් සහතික කරන ලද පිටපත් වලට සහතික කල නිලධාරියා නිසි වටිනාකමින් යුත් මුද්දර යොද ඇති බැවින් ඊට වඩා මුද්දර නුවමනා බවත් කියා සිටියි.

ඉහත කී ලෙස ඉදිරිපත් කරන ලද සහතික පිටපත් හරියාකාර මුද්දර ගසා තිබේ දැයි යන ප්‍රශ්නය අපේ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 92 වෙනි පිට බලනු.

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විනිශ්චයට යොමු කර ඇත. ඉහත කී 24 වෙනි අංකයේ මෙසේ සඳහන් වේ:—

"24. වෙනා විශේෂ හැටියකින් දක්වා නො මැති නම් ඕනෑම ලියවිල්ලක පිටපතක් හෝ උපුටා ගැනීමක් රජයේ නිලධාරියකු සහතික කළවිට .. 1.00"

මේ අංකය "ඒ" උපලේඛනයේ 1 වෙනි කොටසෙහි යෙදී ඇත. එහි ශීර්ෂය පහත සඳහන් වන්නේ ය:—

"මුද්දර ගාස්තු අඩංගු වන නීත්‍යානුකූල ව ලේඛනගත ඔප්පු, ගිවිසුම්, බැඳීම් සහ මුදල් ආරක්ෂාව සඳහා තබන ලද ඇප; සාමාන්‍ය ඔප්පු වලට සහ අනෙක් නීත්‍යානුකූල ලේඛන II, III, VI සහ V සහ VI යන කොටස්වල සඳහන් නැති කරුණු සහ දේ."

II වෙනි කොටසේ 33 වෙනි අංකයෙහි "දිස්ත්‍රික් උසාවියක දී" යන ශීර්ෂයේ මෙසේ කියා තිබේ:—

"33. අන් තැනෙක සඳහන් නො කරන ලද නීත්‍යානුකූල සහතික කළ සියළු නඩු වාර්තා වල පිටපත් . . ." මින් පසු නඩුවේ වටිනාකම අනුව ගෙවිය යුතු විවිධ මුද්දර ගාස්තු සඳහන් වේ.

මගේ අදහස අනුව ඉහත කී I වෙනි කොටසේ පෙනෙන අංක 24 නියෝගය, II වෙනි කොටසේ විශේෂයෙන් දක්වා ඇති උසාවි වල නඩු වාර්තා වල සහතික පිටපත් වලට සම්බන්ධයක් නැති බව පැහැදිලි ය. හරියාකාර මුද්දර ගැසූ ලියවිල්ලක් උසාවියක ඉදිරිපත් කළ විටක දී නැවත වරක් මුද්දර ගාස්තු ඊට ගෙවිය යුතු නොවේ. II වෙනි කොටසේ II වෙනි අංකයේ දක්වන්නේ ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරන සෑම ලියකියවිලි වලින් මුද්දර ගසා ඇති ලියකියවිලි සහ ආකෘති පත්‍රයක මුද්දර ගසා ඇති ලියවිල්ලක් හැර අනෙක් සියළු ලියවිලිනට ම මුද්දර ගාස්තු ගෙවිය යුතු බව යි.

32 වෙනි අංකය දිස්ත්‍රික් උසාවිය වෙත ඉදිරිපත් කරන ලියවිලි වලට ඒ හා සමාන නියමයක් ඇති කර තිබේ.

උගත් රාජ්‍ය නීතිඥතැන රෙජිස්ට්‍රාර්තැනගේ මතය අප ඉදිරියේ ප්‍රකාශ කළ අතර, 24 වෙනි අංකය පළමු වරට ඇතුළත් කෙළේ 1919 අංක 32 දරණ ආඥා පණතින් බව ද නඩු විභාග සම්බන්ධ මුද්දර ගාස්තු නියම කර දුන්නේ 1890 වකවානුවේ දී (1890 නො: 3 දරණ මුද්දර ආඥා පණතේ උපලේඛනය බලනු) බවට අපේ අවධානය යොමු කර අපට දුන් සහාය ගැන අපේ කෘතඥතාවය පලකරමු.

මේ කරුණු නිසා මේ ඉල්ලීම සම්බන්ධව ඉදිරිපත් කරණ ලද ලියකියවිලි නිසියාකාර මුද්දර ගසා තිබෙන නිසා ඒවා පිළිගත යුතු යයි අපගේ කල්පනාව යි.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා :

මම එකඟ වෙමි.

ලියකියවිලි නිසියාකාර මුද්දර ගසා තිබේ යයි තීන්දු කරන ලදී.

ගරු සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා සහ ගරු තම්බයියා විනිශ්චයකාරතුමා ඉදිරිපිට

ඇන්. එච්. තෙරුන්නාන්සේ එ. කේ. අන්ද්‍රායස් අප්පු සහ තවත් තිදෙනෙක්*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 109/64 (එෆ්)—ගාල්ල දිස්ත්‍රික් උසාවියේ අංකය: 6240/එල්.

විවාද කළ දිනය : **1965 මැයි 11.**
තීන්දු කළ දිනය : **1965 මැයි 21.**

විහාර දේවාල ගම් පණත—20, 26 වන ඡේද—ආඥා පණතකට (ඇස්කිසියකට) අනුව පිස්කල් නිලධාරියා විසින් සාංඝික දේපළ අල්වා ගැනීම—මෙය සාංඝික දේපොළ යයි විහාරාධිපතින් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා ඉල්ලා සිටීම—ඉල්ලීම ප්‍රතික්ෂේප කිරීම—සිවිල් නඩු විධානයේ 247 ඡේදයට අනුව නඩුවක්—එය කියාගෙන යාමට ඔහුට තත්ත්වයක් තිබේ ද යන්න.

විහාරාධිපතින් වහන්සේ නමකට විරුධව නිකුත් වූ තීන්දු ප්‍රකාශයකට එකඟ ව පිස්කල් නිලධාරියා විසින් අල්වා ගත් ඉඩමකට පැමිණිලිකරු පහත සඳහන් පරිදි අයිතිවාසිකම් කියමින් එය ඉල්වා සිටියේ ය :—

(ඒ) උන්වහන්සේ විහාරාධිපතින් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වීම ;

(බී) ඒ ඉඩම සාංඝික දේපළ බැවින් එය ඇල්ලීමට නො හැකිවීම.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 93 වෙනි පිට බලනු.

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තමාගේ ඉල්ලීම ප්‍රතික්ෂේප වූ පසු පැමිණිලිකරුවා සිවිල් නඩු විධාන සංග්‍රහයේ 217 වන ඡේදය යටතේ මෙම නඩුව දැමීය. මෙම ඉඩම පැමිණිලිකරු වෙත පැවරී නැතැයි ද, එම නිසා ඔහුට මෙම නඩුව කියාගෙන යාමට තත්ත්ව-යක් නැතැයි ද යන කරුණු උඩ මෙම නඩුව නිෂ්ප්‍රභා විය.

තීන්දුව : (1) පැමිණිලිකරු විහාරාධිපතින් වහන්සේ නො වන නිසා විහාර දේවාල ගම් ආඥා පණතේ 20 වන ඡේදයෙන් විහාරායතන සන්තක සියළුම දේපළ විහාරාධිපතින් වහන්සේ වෙත පැවරෙන බැවින් මෙම නඩුව දැමීමට පැමිණිලිකරුට තත්ත්වයක් නැත.

(2) විහාරාධිපතිට විරුඬ ව තමාගේ නඩත්තුව සඳහා විහාරසන්තක පොදු වස්තුවෙන් කොටසක් ඉල්ලීමට පැමිණිලිකරුට ඇති අයිතිය පුද්ගලික අයිතියක් මිස එය ඉඩමක් පිළිබඳ අයිතියක් නොවේ.

(3) විහාර දේවාල ගම් පණතේ 26 වන ඡේදයෙන් ඇස්කිසියක් නිකුත් කොට විහාර සන්තක ඉඩම් ඇල්වීමට තහනමක් නැත්තේ ය.

නීතිඥවරු : රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, රල්ෆ් ද සිල්වා සහ අයි. ඇස්. ද සිල්වා යන මහතුන් සමග පැමිණිලිකාර-ඇපෑල්කරු වෙනුවෙන්.

ජේ. ඩබ්ලිව්. සුබසිංහ මහතා, පළමු දෙවෙනි සහ තෙවනි විත්තිකාර-වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා

මෙය අසාධික ලෙස ඉඩමකට හිමිකම් කියූ තැනැත්-තෙකු විසින් සිවිල් නඩු විධාන සංග්‍රහයේ 247 වන ඡේදය යටතේ දමන ලද නඩුවකි.

පරගොඩ රජමහා විහාරාධිපති වලවේ පේමරතන ස්ථවිරයන් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා මෙහි පැමිණිලි-කරු ය. තිරුවානකැටිය පන්සල් වත්ත ''සී'' අකුර දමා ලකුණු කරන ලද කොටසක අයිතිය පිළිබඳ ප්‍රකාශ-යක් කරවා ගැනීමට ගාල්ලේ දිස්ත්‍රික් උසාවියේ අංක එල් 5753 දරණ නඩුව පළමුවන, දෙවන, තුන්වන විත්තිකරුවන්ට විරුඬ ව යථෝක්ත විහාරාධිපති වශයෙන් එම ස්වාමීන් වහන්සේ විසින් පවරන ලදී. දෙපාර්ශවයේ ම කැමැත්තෙන් මෙම නඩුව එකී ''සී'' අක්ෂරය දමා ලකුණු කරන ලද කොටස පළමුවන, දෙවන විත්තිකරුවන්ට සහ තවත් පස්දෙනෙකුට හිමිවන හැටියටත් දැනට මෙහි ඇති හතරවන විත්තිකරු විසින් රු. 500!- ක නඩු ගාස්තුවක් ගෙවන හැටියටත් නියම වන සේ තීන්දුවක් ලබා ගෙන බේරුම් කර ගෙන තිබේ.

එම නියෝගය ක්‍රියාවේ යෙදීම සඳහාත් නඩු ගාස්තුව වශයෙන් නියම වූ රු. 500!– අය කර ගැනීම සඳහාත් විනිශ්චිත නය හිමියන් විසින් ''සී'' සළකුණ ඇති කොටසට යාබදව ඇති ''ඩී'' සළකුණ දමා ඇති කොටස අල්වා ගැනීමට පිස්කල් නිලධාරිතැන මෙහෙයවන ලදී. ''ඩී'' අකුර දරණ කොටසට හිමිකම් කියූ මෙම නඩුවේ පැමිණිලිකරු තමා විහාරාධපතින් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා බව කියමින් ද එම ඉඩම් කොටස සාංඝික දේපල නිසා එය පිස්කල් නිලධාරිතැනට අල්වා ගත නො හැකි බව කියමින් ද ඊට විරෝධය පෑවේ ය. තමාගේ හිමිකම් කීම නිෂ්ප්‍රභා කළ පසු උන්වහන්සේ විසින් මෙම නඩුව පවරන ලදී.

එසේ අල්වා ගන්නා ලද ඉඩමට අයිතිවාසිකමක්, හිමිකමක් හෝ සම්බන්ධතාවක් නීතියට අනුව සළකා ගත නොහෙන බව කියමින් ද, එම ඉඩම් කොටස පැමිණිලිකාර ස්වාමීන් වහන්සේ වෙත ඒ තාක් පැවරී නැති නිසා එම නඩුව කියාගෙන යාමට උන්වහන්සේට තත්ත්වයක් නො මැති බව කියමින් ද අතිරේක දිස්ත්‍රික් විනිශ්චයකාර මහතා එම නඩුව ද නිෂ්ප්‍රභා කළේ ය.

අල්වා ගන්නා ලද මෙම ඉඩම් කොටස එම විහාරයෙහි විහාර දේවාල ගම් වලට ඇතුලත් ඉඩමක් යන්න ගැනත් ඒ හේතුවෙන් එය සාංඝික දේපළක් ය යන්න ගැනත් විවාදයක් පැන නො නැගේ. අපට විසඳීමට ඇති ප්‍රධාන ප්‍රශ්නය නම් විහාරාධිපති පදවියක් නො දරණ මෙම පැමිණිලිකරුට එසේ අල්වා ගෙන ඇති ඉඩම විහාරාධිපතින් වහන්සේට විරුඬ ව ඇති නඩු තීන්දුව ක්‍රියාත්මක වන අයුරු විකිණීමට ඉඩ නැතැයි කීමට අයිතිවාසිකමක් තිබේ ද නැද්ද යන්න යි.

නීති ග්‍රන්ථ මාලාවෙහි 318 වන පරිච්ඡේදයට අයත් බෞඬ විහාර දේවාල ගම් පණතේ අංක 20 දරණ ඡේදයෙන් පැනවෙන්නේ පහත සඳහන් පරිදි ය :—

''කිසි යම් පන්සලක ප්‍රයෝජනය සඳහා වෙන් වී ඇත්තා වූ හෝ වෙනත් විදියකින් එම විහාරයට සම්බන්ධකම් ඇත්තා වූ හෝ එම විහාරයට හිමිකම් ඇත්තා වූ හෝ සියළු ම නිශ්චල චංචල දේපලද ඉන් ලැබෙන සියළු ම පළප්‍රයෝජන, කුලී, මුදල්හදල් සහ

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අනිකුත් ප්‍රතිලාභ ද, කිසි යම් භික්ෂු නමකගේ පුද්ගලික පරිහරණය සඳහා පූජා කරන ලද පුද්ගලික දීමනා හැර එම පන්සලට පිරිනමන ලද සියළු දීමනා ද එහි භාරකාර තැන වෙත හෝ එවන්ට කටයුතු කරන පාලක විහාරාධිපතිතැන වෙත හෝ පැවරෙණු ඇත. එය එසේ වූව ද නිශ්චල දේපල සම්බන්ධයෙන් ඇති බදුදීම්, කුලියටදීම්, බැඳීම් හිමිකමට අවහිර කිරීම්, ආදි යම් කිසිවක් වෙතොත් කලින් කී පැවරීම සිදු වන්නේ එ වැනි දේට යටත්ව ය.''

මෙම ඡේදයෙන් ආඥා පණතේ 4 වන ඡේදයෙන් විහාරාධිපතීන් වහන්සේ වෙත පැවරී ඇති සම්බන්ධතා තවත් පෘථුල වන බව පෙනී යයි. එම ඡේදයෙහි පැනවී ඇත්තේ මෙසේ ය :—

'' (1) මෙම උපඡේදයෙහි ක්‍රියාකාරී බලයෙන් බැහැර නො කරන ලද සැම පන්සලකට ම අයත් දේපළ වල පරිපාලනය මෙම ආඥා පණතේ පැනවීම් වලට අනුකූල ව භාරකරු ලෙස හෝ භාරකරුවන් ලෙස හෝ යථා තත්ත්වයෙන් පත් කරන ලද පුද්ගලයෙකු පිට හෝ පුද්ගලයන් පිට හෝ පැවරේ.

'' (2) මෙම උපඡේදයට ආසන්නව ම ඉහළින් පැනෙන උපඡේදයේ ක්‍රියාකාරී බලයෙන් පමණක් බැහැර කොට ඇති එහෙත් සම්පූර්ණ ආඥා පණතේ ක්‍රියාකාරීත්වයෙන් බැහැර නොවී ඇති සැම පන්සලකට ම අයත් දේපලවල පරිපාලනය මින් පසු ' පරිපාලක විහාරාධිපතීන් වහන්සේ ' නමින් සඳහන් වන විහාරාධිපති තැන වෙත පැවරෙනු ඇත.''

26 වන ඡේදයෙහි මෙසේ ගැබ් වී ඇති ඉතා පැහැදිලි වචන ගැන සලකන විට මේ නඩුවේ පැමිණිලිකරුට උන්වහන්සේ විහාරාධිපතීන් වහන්සේගේ ශිෂ්‍යයෙකු නිසා මෙම පන්සලෙහි දේපල ගැන යම් කිසි අයිතිවාසිකමක් තිබේ යයි කරුණු ගෙන හැර දක්වමින් ජයවර්ධන මහතා ඉදිරිපත් කළ තර්කය අපට පිළිගත නො හැක. පැමිණිලිකරුට මෙම විහාරස්ථානයේ පොදු වස්තු සම්භාරයෙන් නඩත්තු වීමට සුදුසුකම් තිබේ යයි විහාරාධිපතීන් වහන්සේට විරුඩ ව හිමිකමක් ඉල්වීමට අයිතියක් ඇති බව ගැන සැකයක් නැත. එ බඳු ඉල්ලීමක් ඉටු කිරීමෙහි ලා විහාරායතන ඉඩම් වලින් ලැබෙන කුලී සහ ලාභ යෙදවීමට විහාරාධිපතීන් වහන්සේට පිළිවන. නමුත් භික්ෂුවකට ඇති එම අයිතිවාසිකම විහාරාධිපතීන් වහන්සේට විරුඩ ව ඇති පුද්ගලික අයිතිවාසිකමක් විනා ඉඩමකට ඇති අයිතිවාසිකමක් නොවේ.

විහාරයකට අයිති ඉඩමක් විකිණීම දැනට පාලනය වන්නේ ආඥා පණතේ 26 වන ඡේදයෙන් යයි කියමින් ජයවර්ධන මහතා කළ කරුණු ඉදිරිපත් කිරීම නිවැරදි ය. 26 වන ඡේදය පහත පෙනෙන පරිදි ය:—

'' විහාරයකට අයිති නිශ්චල දේපල උකස් තැබීමක්, විකිණීමක් හෝ අන් අයුරකින් අන්සතු කිරීමක් නීත්‍යානුකූල නො වන අතරම එයින් කිසිදු නීතිගත ප්‍රතිඵලයක් ඇති නොවේ:

එහෙත් යම් කිසි ප්‍රවේණි පංගුවක් පිළිබඳ ව හෝ මහ භාරකාරතැනට තුන්මසකට පෙර ලිඛිත නිවේදනයක් යැවුණු පසු නඩු තීන්දුවක් ක්‍රියාවෙහි යෙදීම සඳහා කෙරෙන ඉඩම් ඇල්ලීමකට මෙම ඡේදය ක්‍රියාත්මක නො වෙනු ඇත.''

26 වන ඡේදයෙහි ඇති පැනවීම මෙම නඩුව ගැන සලකා බැලීමේ දී ඒවා ක්‍රියාත්මක කළ හැකි සුදුසු කාලය අවලංගු කළ හැකි එම උකස් කිරීම විකිණීම හෝ අන් අයුරකින් අන්සතු කිරීම සිදු වූ පසු පමණක් බව පෙනී යන සේ ය. නඩු තීන්දුවක් ක්‍රියාත්මක කිරීම සඳහා විහාරායතන ඉඩමක් ඇල්වීම 26 වන ඡේදයෙන් තහනම් වී නැත. ඉහත සඳහන් පරිදි මහා භාරකරුට ලිඛිත නිවේදනයක් දී නැති බව මෙහි දෙපක්ෂය ම පිළිගන්නා කරුණකි. නමුත්, මේ කරුණ වුව ද විත්තිකරුගේ ආධාරයට මෙහි දී ගැනීමට පුළුවන් කමක් නැත.

කෙසේ හෝ වේවා එම ඡේදයෙන් අදහස් කෙරෙන්නේ නඩු තීන්දුවක් ක්‍රියාත්මක කිරීමට විහාරසන්තක ඉඩමක් ඇල්ලා විකිණීම පිළිබඳ ව බව කිවයුතු ය. මෙම ප්‍රශ්නයට 18 වන ඡේදය ද උචිත බව සැළකිය යුතු ය. එම ඡේදය යටතේ ආඥා පණතින් තමා පිට පැවරුණු කිසි යම් දේපළක් ආපසු ලබා ගැනීම සඳහා ''පන්සලෙහි භාරකරු'' යන නමින් සහ එම විලාසයෙන් පාලක විහාරාධිපතීන් වහන්සේට නඩු පැවරිය හැක. අංක එල් 5753 දරණ ඉහත සඳහන් නඩුවෙන් 4 වන විත්තිකරු කර තිබෙන්නේ මෙම ක්‍රියාව ය. ජයවර්ධන මහතා එම ක්‍රියාව වංචනික සහයෝගයකින් කරන ලද ක්‍රියාවක් යයි කියන නමුත් එම නඩුවෙන් නිකුත් වී ඇති තීන්දු ප්‍රකාශයට විරෝධයක් පෑමට මෙහි දී අවකාශයක් නැත.

ආඥා පණතේ 20 වන ඡේදයේ වරදවා තේරුම් නො ගත හැකි පදවලල්ලකින් කියා ඇති පරිදි විහාරයකට අයිති සියළු ම දේපල එම විහාරයේ අධිපතිතැන වෙත පැවරෙන බව නිගමනය කොට ඇති දිස්ත්‍රික් විනිශ්චයකාරතුමාගේ නඩු තීන්දුවට එකඟ වීම හැර වෙන වැඩිමනත් කරුණු අප විසින් කීම අනවශ්‍ය සේ හැඟේ.

මෙම ඇපැල නඩුගාස්තුවටත් යටත් කොට නිෂ්ප්‍රභා වේ.

ගරු තම්බයියා විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

ඇපැල නිෂ්ප්‍රභා විය.

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ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

වික්‍රමසිංහ, (ආහාර හා මිළ පාලන පරීක්ෂක තැන) එ. චන්ද්‍රදාස*

ශ්‍රෙෂ්ඨා. අංකය: 294/65—මහනුවර දිස්ත්‍රික් උසාවියේ අංකය: 38788.

විවාද කොට තීන්දු කළ දිනය: 9 ජුලි 1965.

අපරාධ නඩු විධාන සංග්‍රහයේ 171 වෙනි ඡේදය—මිල පාලන පණත—සියබලා පාලන මිලට වැඩි මුදලකට විකුණන ලදැයි චෝදනාවක්—අපරාධ නඩු විධාන සංග්‍රහයේ 148 (1) (බී) ඡේදයට අනුව දෙන රපෝර්තුවේ සඳහන් වී ඇතත් චෝදනා පත්‍රයෙහි දණ්ඩන පැනවීම ගැන සඳහන් නොවී තිබීම—විකුණනලද සියබලා පිටරටින් ගෙන්වන ලද දේ ද ස්වදේශීය සියබලා ද යන්න ගැන සාක්ෂි ඉදිරිපත් නො කිරීම—විත්තිකරු නිදහස් වීම—දණ්ඩන පැණවීම සඳහන් නො වීම නඩුව අසාර්ථකවීමට හේතුවක් ද යන වග—කරුණු ඔප්පු කිරීමේ කාර්‍ය්‍යභාරය.

නියමිත වැඩිම පාලන මිලට වඩා වැඩි මුදලකට සියබලා රාත්තල් බාගයක් විකුණන ලදැයි යන චෝදනාවට නඩු දමන ලද විත්තිකරු—

(ඒ) චෝදනා පත්‍රයෙහි දණ්ඩන පැණවීමේ කොටස් සඳහන් වී නැතැයි ද ;

(බී) එම සියබලා පිට රටින් ගෙන්වන ලද දේ දැයි නැතහොත් මෙ රට සියබලා දැයි යන්න ගැන සාක්ෂි ඉදිරිපත් වී නැතැයි ද යන කරුණු දෙක උඩ නිදහස් කර හරිනු ලැබිය.

තීන්දුව : (1) දණ්ඩන පැණවීමේ කොටස චෝදනා පත්‍රයෙහි සඳහන් නො වීම නීති විරෝධ යයි ගිණිය නො හැක. තමා මිල පාලන පණතට අනුව චෝදනා ලබා ඇති බව දන්නා බැවිනුත් ඒ ගැන චෝදනා පත්‍රයෙහි සඳහන් වී ඇති බැවිනුත් මෙය මෙසේ සැලකේ. (අපරාධ නඩු විධාන සංග්‍රහයේ 171 වන ඡේදය බලන්න).

(2) විකුණන ලද සියබලා පිට රටින් ගෙන්වන ලද දේ යයි ඔප්පු කිරීමට පැමිණිලි පක්ෂය බැඳී නැත. මක්නිසා ද? මිල පාලනය කර ඇත්තේ පිට රටින් ගෙන්වන ලද සියබලා පමණක් නොව දෙ වර්ගය ම නිසා ය.

නීතිඥවරු : ආර්. අබේසූරිය මහතා, රජයේ අධිනීතිඥ, පැමිණිලිකාර-අපැල්කරු වෙනුවෙන්.

ඒ. එච්. මුමීන් මහතා, එස්. ගුණසේකර මහතා සමග, චෝදිත-වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

මෙම නඩුවෙහි චෝදිතයා විසින් සියබලා රාත්තල් බාගයක් ශත -/30 කට විකුණන ලදී. පාලිත මිළ අනුව මෙය විකිණිය හැකි මුදල ශත -/26 කි. විකුණා ඇති මුදල ඊට වඩා වැඩිය.

සිතාසිය ලැබූ චෝදිතයා උසාවියට පැමිණියේය. නඩු පොතත් මෙම සිතාසිය ඇමිණී ඇතත් එහි සටහන් වී ඇති පරිදි වෙනම අමුනා ඇති කොලයක ලියූ චෝදනා විස්තර නඩු පොතට ඇමිනී නැතිසේ පෙනේ.

අපරාධ නඩු විධාන සංග්‍රහයේ 148 (1) (බී) ඡේදය යටතේ උසාවියට ඉදිරිපත් කරන ලද වාර්තාවෙහි දණ්ඩන විධි විධාන පිළිබඳව ද සටහන් කොට තිබේ. කෙසේ වෙතත් විත්ති කරුට විරුඬව චෝදනා ඉදිරිපත් කරන ලද චෝදනා පත්‍රයෙහි එම දණ්ඩන විධිවිධානය සඳහන්වී නැත. ඇටෝර්නිජනරාල් එ. භාස්කරන්, 62 න.නී.වා., 64 වන පිටෙහි වාර්තා වී ඇති නඩුවෙහි ලඝු නඩු විභාගයක දී චෝදනා සැදීම මහෙස්ත්‍රාත්වරයා පිට පැවරී ඇති වගකීමකැයි සඳහන් වී තිබේ.

එමෙන් ම අපරාධ නඩු විධාන සංග්‍රහයෙහි 171 වන ඡේදයේ පහත සඳහන් පරිදි පැනවී තිබේ : "චෝදිතයා මුලා කෙරෙන අවස්ථාවක හැර ඔහු කළ වරද හෝ චෝදනාව පිළිබඳව සඳහන් විය යුතු විස්තර හෝ සඳහන් කිරීමේ දී සිදුවන වරදක් සහ එම වරද හෝ එහි විස්තර හෝ සඳහන් කිරීමට අතපසුවීම නඩුවේ කොයි ම අවස්ථාවක වත් සැලකිය යුතු දෙයක් හැටියට නො සැලකිය යුතු යි". මෙහි ලා කිය යුත්තේ අපරාධ නඩු විධාන සංග්‍රහයේ 148 (1) (බී) ඡේදය යටතේ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 68 වෙනි කා., 103 වෙනි පිට බලනු.

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උසාවියට ඉදිරිපත් කරන ලද වාර්තාවේ අවසාන කොටස චෝදනා පත්‍රයෙන් ඉවත් වී ඇති බව ය. මගේ අදහසේ හැටියට මෙය නීති විරෝධී ක්‍රියාවක් නොවේ. මන්ද, තමාට විරුඬව චෝදනා ඉදිරිපත් කරන ලද්දේ කුමන පනතක් අනුව ද යන්න එනම් මිල පාලන පනත සටහන්ය යන්න විත්තිකරුට දැනගැනීමට හැකි වන කරුණු තිබෙන නිසා ය. එමෙන් ම චෝදනා පත්‍රයේ අඩංගු වී නඩු පොතට ඇමිනී ඇති කොටසෙහි එම පනත සහ පනතෙහි 4 වන ඡේදය සහ 3 (2) දරන ඡේදය ගැන ද සඳහන් වී තිබේ. (**ජයවර්ධන එ. අලුවිහාරේ**, 64 සතිපතා ලංකා නීති සංග්‍රහය, 92 වන පිට.)

60 නව නීති වාර්තා 392 වන පිටේ ඇති **සෙනෙවිරත්න එ. ඩීන්** අතර තිබුනු නඩුව ගැන මූමින් මහතා විසින් සඳහන් කරන ලදී. එහි "චෝදනාවක නිවැරදි දණ්ඩන ඡේදය සඳහන් නො කිරීම අපරාධ නඩුවිධාන සංග්‍රහයේ 171 වෙනි ඡේදයෙහි සඳහන් වන වරදට වඩා වැඩි දෙයකැයි" සඳහන් වී තිබේ. නමුත් සතිපතා ලංකා නීති සංග්‍රහයෙහි (ඉහත සඳහන්) නඩුවෙහි සඳහන්ව ඇත්තේ මෙසේ ය : "යුක්තිය ඉටු කිරීමෙහි ලා වරදක් සිදුවී ද නැද්ද යන්න විනිශ්චය කිරීමෙහි දී මුලු නඩුවම සලකා බලා වරද කළ මිනිහෙකු නිදහස් වී ඇද්ද යන බව හෝ නිවැරදිකරුවෙකු වරද කරු වී ඇද්ද යන බව හෝ එම උසාවියට ම තීරනය කිරීමට බලය තිබේ". මේ අනුව සලකා බලන විට මෙම නඩුවෙහි දණ්ඩන ඡේදය සඳහන් කිරීම අතපසු වී තිබීම නඩුව ව්‍යර්ථවීමට හේතු වන අක්‍රමිකතාවයක් නොවේ.

අතිරේක මහේස්ත්‍රාත්වරයා පැමිණිලි සාක්ෂි අවසාන-යේදී විත්තිකරු නිදහස් කිරීමට හේතු වූ අනිත් කරුණ නම් මෙම සියඹලා පිට රටකින් ගෙන් වූ සියඹලා ද නැත හොත් මෙ රට සියඹලා දැයි නිගමනය කිරීමට සාක්ෂි නොමැති වීම ය. පිට රටින් ගෙන් වූ සියඹලා වල පමණක් මිල සීමා කර ඇතැයි යන මතය ඔහු පළ කරයි. **ප්‍රනාන්දු එ. හමීඩ්**, 48 න.නී.වා. 91, යන නඩුව ඔහුට පෙන්වා දෙන ලද නමුත් ඔහු තම නියෝගයේ දී එම නඩුව ගැන සඳහන් නොකෙළේය. පෙනී යන පරිදි ඒ ගැන ඔහු කොහෙත් ම සලකා බලා නැත. ඉහත සඳහන් නඩුව පමණක් නොව **හෙවසිලියනගේ එ. පොලිසිය**, 47 න.නී.වා. 301, යන නඩුව ද මෙයට ගැලපෙන කරුණු වලින් යුක්ත බව පිළිගත යුතු යි.

ගැසට් පත්‍රයේ උපලේඛනයේ තීරු හතරක් පෙනේ. මුල් තීරුවේ "ද්‍රව්‍යය" සඳහන් කළ යුතුව තිබේ. දෙවන තීරුවෙහි "විදෙසින් බඩු ගෙන්වන්නාවුන්" තොග වශයෙන් හොණ්ඩරයක් විකිණිය යුතු වැඩිම මුදල දළ වශයෙන් සඳහන්වේ. තෙවැනි තීරුවෙහි සඳහන් වන්නේ "තොග වෙළඳුන්" විසින් හොණ්ඩර-යක් තොග වශයෙන් විකිණිය හැකි වැඩි ම මුදල ය. හතරවැනි තීරුවෙහි ඇත්තේ "සිල්ලර වෙළඳුන්" විසින් සිය වියදම් හැර අන් ලාභයක් ලැබීම සඳහා රාත්තලක් විකිණිය යුතු මුදල ය. විත්තිය වෙනුවෙන් ඉදිරිපත් කළ තර්කය වූයේ දෙවැනි තීරුවෙහි පිටරටින් බඩු ගෙන්වන්නවුන් විසින් තොග වශයෙන් විකිණිය යුතු වැඩිම මුදල ගැන සඳහන්ව ඇති නිසා, සියඹලා රාත්-තලක් සිල්ලරට විකිණිය යුතු වැඩි ම මුදලින් අදහස් කෙරෙන්නේ පිට රටින් ගෙන්වන සියඹලාවල මුදල යන්න ය. ඉහත සඳහන් කරණ ලද නඩු දෙකේදී ම මෙම ප්‍රශ්නය ගැන සලකා බලා තිබේ. එහි දී තීරණය වූයේ හතරවන තීරුව දෙවන තීරුවෙන් පාලනය නො වන බව හා මිල පාලනය වී ඇත්තේ පිට රටින් ගෙන්වන ලද සියඹලා වල පමණක් නොව මෙ රට සියඹලා වල මිලත් එසේ පාලනය වී ඇති බව ය. එ බැවින් එම නඩු වල ද තීන්දු අනුව යමින් මා පිළිගන්නේ මිල පාලනය වී ඇත්තේ පිට රටින් ගෙන්වන සියඹලා වල පමණක් නොව මෙ රට සියඹලා වලත් මිල පාලනය වී ඇති බව ය. මේ නිසා මෙහි දී විකුණන ලද සියඹලා වර්ගය පිට රටින් ගෙන් වූ සියඹලා බව ඔප්පු කිරීමට පැමිණිලි පක්ෂය බැඳී නැත.

මෙම කරුණු අනුව විත්තිකරු නිදහස් කරමින් දෙන ලද නියෝගය ඉවත හෙලන මම මෙම නඩුව මනාසේ සකස් කෙරෙණ චෝදනාවක් උඩ නැවත ඇසීම පිණිස වෙන මහේස්ත්‍රාත්වරයකු වෙත යැවීමට අදහස් කරමි.

නැවත විභාගයට යවන ලදී.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා සහ මානික්කවාසගර් විනිශ්චයකාරතුමා ඉදිරිපිටදී

ලීලාරත්න සහ තවත් කෙනෙක් එ. නිකුලස් සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 478/63—බලපිටිය දිස්ත්‍රික් උසාවිය, 1344/N P.

විවාද කොට තීන්දු කළ දිනය : 1965 ජුලි මස 6 වෙනි දින.

බෙදුම් නඩුවක්—අවසාන තීන්දු ප්‍රකාශය—එසේ ප්‍රකාශ තීන්දුවකින් බෙද වෙන් කළ ඉඩම් කැබැල්ලක හිමිකම තීරණය කිරීමට එම අවසාන තීන්දු ප්‍රකාශයෙන් පිටස්තර කරුණු උසාවියක් පරීක්ෂා කල යුතුද?

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 111 වෙනි පිට බලනු.

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බෙදුම් නඩුවක 1932 වෙනි වර්ෂයේ දී තිරණය කරණ ලද අවසාන තීන්දුවකින් 'පී' යන අයට සහ ඔහුගෙන් පැපෙන තව තුන්දෙනෙකුට ඉඩම් කැබෙල්ලක් හිමිවිය. ඉන් පසු මෙම නඩුවේ ඇපැල් කරුවන් සහ 5 වෙනි වග උත්තර විත්තිකරු අතර එකී 'පී' නැමැත්තාගේ 1/4 කොටසට ආරවුලක් ඇතිවුනි. 5 වෙනි වගඋත්තරකරු කියා සිටියේ එම 1/4 කොටස ඔහුට එම තීන්දුවෙන් හිමිකල යුතුව තිබුන බවයි. උගත් දිස්ත්‍රික් නඩුකාර තුමා අවසාන තිරණයෙනුත් ඔබ්බට බලා අන්තර ප්‍රකාශයක් ද පරික්ෂා කොට පස් වැනි වග උත්තරකරුට එම කොටස දිය යුතු බව නිගමනය කළ හෙයින් එම තීන්දුව ඇපැල් උසාවියට ඉදිරිපත් වූයේය.

තීන්දුව : උගත් දිස්ත්‍රික් විනිශ්චයකාර තුමා අවසාන තීන්දුව පමණක් නොබලා ඉන් ඔබ්බට බැලීමෙන් වරදක් කර තිබේ. අවසාන තීන්දු ප්‍රකාශයක් වාර්තා ගතවූවිට බෙද වෙන් කල එක එක ඉඩම් කොටසකට අළුත් හිමිකමක් ඇති ඒ හිමිකම නඩුවේ පාර්ශවකරුවන් අතර පමණක් නොව අනික් හැම කෙනෙකුටම විරුඬව තීන්දු ප්‍රකාශයේ සඳහන් වන අය සතුවේ.

නීතිඥවරු:— රාජනීතිඥ ඊ. බී. වික්‍රමනායක මහතා, රෝලන්ඩ් ද සොයිසා මහතා සමග, 17–21 වන විත්තිකරුවන් වෙනුවෙන්.

ඇම්. ඇල්. ද සිල්වා මහතා, ආර්. ගුණතිලක මහතා සමග 5 වන විත්තිකාර–වගඋත්තරකරු වෙනුවෙන්.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා

''ඇක්ස්'' අක්ෂරය දමා ලකුණු කරන ලද සැලස්මක ගල්ගොඩ ඉඩමේ අංක 6 දරණ කොටස නමින් හැඳින් වෙන ඉඩමක් බෙදීම පිළිබඳ ව මෙම නඩුව පවරණ ලදි.

මෙම ඉඩම් කොටස මීට කලින් ගාල්ලේ දිස්ත්‍රික් උසාවියේ අංක 24006 දරණ බෙදුම් නඩුවකින් බෙදන ලද ලොකු ඉඩමක කැබැල්ලකි. වර්ෂ 1932 නොවැම්බර් මාසයේ දී දෙන ලද එම නඩුවේ අවසාන තීන්දු ප්‍රකාශයෙන් මෙම කොටස එම නඩුවෙහි 8 වන, 10 වන, 11 වන විත්තිකරුවන්ට සහ පෙත්තප්පු නැමැත්තෙකුට ද හිමි කර දෙන ලදි. මෙම නඩුවේ දී ඇති වී තිබෙන අරගලය පෙත්තප්පුට හිමි 1/4 කොටස සම්බන්ධයෙනි. මෙයට එක් පසකින් ඇපැල්කරුවන් හිමිකම් කියන අතර අනික් පසින් පස්වෙනි විත්තිකාර–වගඋත්තරකරු ද හිමිකම් කියයි. කලින් සඳහන් නඩුවේ අවසාන තීන්දු ප්‍රකාශයෙහි ඉහත කී 1/4 කොටස පෙත්තප්පුට දී තිබෙන නමුත් එය දිය යුත්තේ 5 වන විත්තිකරුට යයි උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා ඉදිරියේ තර්ක කොට තිබේ. මෙහි දී උගත් විනිශ්චයකාරතුමා එම නඩුවේ අවසාන තීරණයෙනුත් ඔබ්බට බලා අන්තර තීන්දු ප්‍රකාශය ගැන ද පරීක්ෂා කොට 1/4 ක් පස්වන විත්තිකාර-වගඋත්තරකරුට දිය යුතු ය යන නිගමනයට බැස ගත්තේ ය. එසේ කිරීමෙන් විනිශ්චයකාර මහතා වරදක් කර ඇති බව මගේ මතයයි. බෙදුම් නඩුවක අවසාන තීන්දු ප්‍රකාශයක් වාර්තාගත වූ විට එයට අනුව යම් කිසි ඉඩම් පැවරෙන්නෙකුට හෝ පැවරෙන්නන්ට එම තීන්දුව නිසාම ඉඩම් කොටසකට **අළුත් හිමිකමක්** ඇතිවේ. බෙදුම් නඩුවල අවසාන තීන්දු ප්‍රකාශ වලින් කෙරෙන්නේ අධිකරණගාමී පාර්ශවකරුවන් අතර පැවතෙන හිමිකම තහවුරු කෙරෙන ප්‍රකාශයක් කිරීමක් පමණක් නොවේ. අනික් සැම කෙනෙකුට ම—කවර තරාතිරමක පුද්ගලයන් හෝ වේවා ඔවුනට විරුඩ ව අළුත් හිමිකමක් නිරවශේෂයෙන් ම එම තීන්දු ප්‍රකාශයෙන් පාර්ශවකරුවන් සතුවේ. (බර්නාඩ් එ. ප්‍රනාන්දු, 16 න.නි.වා. 438 වන පිට, ඇති නඩුව බලන්න). මේ නියායෙන් බලන කල මෙම බෙදුම් නඩුවට භාජන වනු ලැබූ ඉඩමෙන් 1/4 ක් පෙත්තප්පුට අයිති වී තිබිණ. විසඳීමට ඇති එකම ප්‍රශ්නය මෙම 1/4 ක වෙන අයෙකුගේ බුත්තියට පව් වී තිබේ ද නැද්ද යන්නයි. උගත් විනිශ්චයකාර මහතා තීන්දු කර ඇත්තේ මෙම කොටස ඇත්ත වශයෙන් ම ඇපැල්කරුවන්ගේ පියා වන ජේම්ස් නමැත්තෙකු විසින් අවුරුදු 30 කට අධික කාලයක් භුක්තිවිඳ ඇති බවත් ජේම්ස් වෙන කිසිලෙසකින් භුක්ති විඳ නැති බවත් ය. ඉදින් උගත් විනිශ්චයකාර වරයා කළ යුතුව තිබුනේ මෙම 1/4 ක ජේම්ස්ගේ උරුමක්කාරයන්ට සහ ඔහුගෙන් පැවතෙන්නන්ට හිමි කර දීමයි.

විත්තිකාර–වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි උගත් නීතිවේදියා දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ නිගමනයට රුකුල් දීමට පරිශ්‍රමයක් නො දරුවේ ය.

මේ නිසා පෙත්තප්පුට හිමි වූ 1/4 කොටස කෙරෙහි බලපවත්වන අයුරින් දිස්ත්‍රික් විනිශ්චයකාරවරයා දී ඇති තීන්දුව මම ඉවත ලමි. එම කොටස ජේම්ස්ගේ වැන්දඹුවට ද ළමයිනට ද දෙන ලෙස නියෝග කරමි.

මෙම අභියාචනයෙහි ගාස්තුව ද ඇපැල්කරුවන් ලැබිය යුතු අතර රු. 52 ශත 50 කැයි නියමව ඇති පහල උසාවියේ විවාද කිරීමේ ගාස්තුව ද ඔවුනට ලැබිය යුතු ය.

ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

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ගරු අබේසුන්දර සහ ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමන් ඉදිරිපිට

එදිරිසිංහ එ. ගුණසේකර*

ශ්‍රෙ. අංකය: 134 (අතුරු ඇපෑල), 1962—මාතර දිස්ත්‍රික් උසාවිය, අංකය: ඇල්/1621.

විවාද කොට තීන්දු කළ දිනය : 28 නොවැම්බර් 1963.

සිවිල් නඩු විධාන සංග්‍රහයේ 88 වන ඡේදය—විත්තිකරු නියමිත දින උසාවියට නො පැමිණීම—විත්තිකරුට තමාගේ නො පැමිණීම ගැන "නයිසයි" නියෝගයට කලින් කරුණු කිය හැකිද යන්න.

විත්තිකරුට 29.8.62 දරණ දින පැමිණීම සඳහා සිතාසි භාර දෙන ලදුව ඔහු එ දින උසාවියට නො පැමිණියේ ය. නඩුව මේ නිසා 30.10.62 දරණ දින ඒකපාක්ෂිකව විභාග කිරීමට නියම විය. එම දිනට කලින් උසාවියට පැමිණි විත්තිකරු තමාගේ පෙරකලාසිය සමග 29.8.62 වන දින නො පැමිණීමට හේතු දක්වීමට අවසර දෙන ලෙස උසාවියෙන් ඉල්ලා සිටියේ ය. මේ සඳහා විභාගයක් පැවැත් වූ විනිශ්චයකාරතුමා, පළමුව විත්තිකරු තමාගේ නො පැමිණීම ගැන සමාවක් ලැබීමට සෑහෙන කරුණු කියා නැතැයි යන මතය ද, දෙවනුව විත්තිකරුට තමා නො පැමිණීම ගැන නිදහසට කරුණු කිය හැක්කේ "නයිසයි" නියෝගය නිකුත්වූවාට පසුව යයි යන මතය ද පළ කරමින් විත්තිකරුගේ ඉල්ලීම ප්‍රතික්ෂේප කෙළේ ය.

තීන්දුව : (දිස්ත්‍රික් විනිශ්චයකාරතුමාගේ මතය සනාථ කරමින්) විත්තිකරු තමාගේ නො පැමිණීම ගැන තම නිදහසට සෑහෙන පමණ කරුණු කියා නැත.

අධිකරණ ප්‍රකාශය :—"නයිසයි" නියෝගය දීමට කලින් පැමිණ තමා නියමිත දින නො පැමිණීම පිළිබඳව කරුණු කීමට විත්තිකරුවකුට නිදහස තිබේ. (**කේ. ඒ. පෙරේරා එ. එච්. ඊ. අල්විස්, 60 න.නී.වා. 260,** අනුගමනය කරණ ලදී.)

නීතිවේදියෝ : ඇස්. ඩබ්ලිව්. ජයසූරිය මහතා, කේ. වරවනමුත්තු මහතා සමග, විත්තිකාර ඇපෑල්කරු වෙනුවෙන්.

ඩබ්ලිව්. ඩී. ගුණසේකර මහතා, පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා

මෙම නඩුවෙහි විත්තිකරුට සිතාසි භාර දෙන ලදුව සිතාසි ආපසු ලැබිය යුතු දිනය වන වර්ෂ 1962 අගෝස්තු මස 29 වන දින ඔහු උසාවියට නො පැමිණියේ ය. ඉන් පසු මෙම නඩුව ඒකපාක්ෂිකව 1962 ඔක්තෝබර් මස 30 වන දින විසඳීමට නියම විය. මෙසේ ඒකපාක්ෂිකව විසඳීමට නියමිත දිනට කලින් පැමිණි විත්තිකරු තමාගේ පෙරකලාසි පත්‍රය සමග තමාට 1962 අගෝස්තු මස 29 වන දින පැමිණීමට නො හැකිවීමට හේතු ඉදිරිපත් කිරීමට උසාවියෙන් අවසර ඉල්ලා සිටියේ ය. මේ පිළිබඳව පරීක්ෂණයක් පැවැත් වූ උගත් විනිශ්චයකාර මහතා විත්තිකරු විසින් ම උසාවියට ගෙන හැර දක්වූ කරුණු අනුව සලකන විට ඔහු සිතාසි ආපසු ලැබිය යුතු දිනයෙහි නො පැමිණීම නොවැලක්විය හැකි කරුණක් නිසා සිදුවී නැතැයි යන මතය පළ කරමින් ඔහුගේ ඉල්ලීම වර්ෂ 1962 නොවැම්බර් මස 9 වන දින ප්‍රතික්ෂේප කෙළේ ය. දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ එම මතයට අපිද එකඟ වෙමු. තම නියෝගයෙහි දිස්ත්‍රික් විනිශ්චයකාර මහතා විත්තිකරුගේ ඉල්ලීම නියම කාලයට කලින් කරණ ලද ඉල්ලීමකැයි ද තමාට සිතාසි ආපසු ලැබිය යුතු දින පැමිණීමට නො හැකිවීම ගැන දක්වීමට යුක්ති යුක්ත හේතුව ඇති බව කීමට බලය ඇත්තේ "නයිසයි" නියෝගය නිකුත් කිරීමට පසුව යයි ද යන මතය ද වැඩිදුරටත් ප්‍රකාශ කෙළේ ය. දිස්ත්‍රික් විනිශ්චයකාර මහතාගේ ඒ පසුව සඳහන් කළ මතයට අපි එකඟ නො වෙමු. ඒකපාක්ෂිකව නඩුව ඇසීමට නියමිත දිනට කලින් ඕනෑම අවස්ථාවක පැමිණ තමාගේ නො පැමිණීමට යුක්ති යුක්ත හේතුන් ඇතැයි උසාවිය තෘප්තියට පත් කිරීමට විත්තිකරුට බලය තිබෙන බව අපේ නිගමන යයි. අපගේ මේ නිගමනය මෙම අධිකරණයෙන් දෙන ලදුව, 60 න.නී.වා. 260 වන පිටේ වාර්තා වී ඇති, **කේ. ඒ. පෙරේරා එ. එච්. ඊ. අල්විස්** යන නඩුවෙන් ද පිටුවහල ලබන්නකි.

තමා විසින් ම ඉදිරිපත් කරණ ලද කරුණු අනුව විත්තිකරු නො පැමිණීම නො වැළැක්විය හැකි කරුණක් අනුව සිදුවී නැතැයි යන්න ගැන අපත් දිස්ත්‍රික් විනිශ්චයකාරවරයා සමග එකඟ වන නිසා "නයිසයි" නියෝගයෙන් පසු විත්තිකරුට තමාගේ නො පැමිණීම ගැන ක්ෂමාව යැදීමට තවත් අවස්ථාවක් දිය යුතු නැතැයි ද අපි උපදෙස් දෙමු. මෙම නඩුවෙහි ඒකපාක්ෂික විභාගය එසේ ම පැවැත්විය යුතු ය. නඩු ගාස්තුවත් අය කර ගත හැකි පරිදි මෙම අභියාචනය අපි නිෂ්ප්‍රභා කරමු.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

ඇපෑල නිෂ්ප්‍රභා විය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 68 වෙනි කා., 110 වෙනි පිට බලනු.

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